In the

United States Court of Appeals

For the Seventh Circuit

No. 10192

KAKU NAGANO,

Plaintiff-Appellant,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL, ETC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

AUG 7 1950

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1 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of March (it being the 6th day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty and of the Independence of the United States of America the 174th Year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable Elwyn R. Shaw, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Thursday, March 16, 1950.

Court met pursuant to adjournment.

Present: Honorable William J. Campbell, Trial Judge.

2 IN THE UNITED STATES DISTRICT COURT.

For the Northern District of Illinois,

Eastern Division.

Kaku Nagano, *Plaintiff,*

vs.

Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, *Defendant.*

No. 47 C 1830.

Be It Remembered, that, on to-wit, the 19th day of December, 1947, the above-entitled action was commenced by the filing of the following Complaint, in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures, following, to-wit:

3 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—47-C-1830) * *

COMPLAINT IN EQUITY UNDER SECTION 9(a) OF TRADING WITH THE ENEMY ACT, AS AMENDED.

1. (a) Plaintiff, Kaku Nagano, is a native born citizen of Japan. Plaintiff is a permanent resident of the United States of America, having immigrated to the United States in the year 1915 as a permanent resident, having resided within the United States for a period in excess of seven consecutive years thereafter and never having relinquished her said United States domicile within the meaning of Section 3 of the Immigration Act of 1917 (U. S. Code, Title 8, Sec. 136(p)).

Plaintiff is married to one Shinsaku Nagano, a native born citizen of Japan, who immigrated to the United States of America as a permanent resident in the year 1906 and whose permanent residence, both legally and physi-

cally, has continued at all times to be in the United States of America, at Chicago, Illinois. Plaintiff is and has been physically but temporarily in Japan under the circumstances more particularly hereinafter set forth without at any time abandoning or relinquishing or intending to abandon or relinquish her permanent domicile and residence in the United States of America. Plaintiff is not an enemy or an ally of an enemy nor is she a "national of a designated enemy country" within the meaning
4 of any of the sections of the Trading with the Enemy Act as amended.

(b) This action arises under Section 9(a) of the Act of October 6, 1917, 40 Stat. L. 411, U. S. C. A. Title 50 App. Par. 9(a) as amended, known as the "Trading with the Enemy Act," as hereinafter more fully appears, and is brought against the defendant Tom C. Clark, Attorney General of the United States, as successor to the Alien Property Custodian, for the purpose of: (1) ascertaining and establishing the title and ownership of plaintiff in certain shares of stock of The Fuji Trading Company, vested by said Custodian as more particularly hereinafter alleged; (2) establishing that plaintiff is neither an enemy, ally of enemy, nor national of a designated enemy country within the true meaning and intent of the statute and of the executive regulations promulgated thereunder; and (3) enjoining the sale of any shares of The Fuji Trading Company, as more particularly hereinafter prayed.

2. The Fuji Trading Company is a corporation organized under the laws of the State of Illinois, having its principal office and place of business at Chicago, Illinois, and is engaged in the business of manufacturing and selling Chinese and oriental food products. The business was founded in 1910 by Shinsaku Nagano, husband of the plaintiff, and has been carried on since that date under his sole management and direction. The business is competitive and The Fuji Trading Company is a leading company within the United States in terms of volume and reputation of product. In 1911 the business was incorporated under the laws of Illinois and since that time Shinsaku Nagano, husband of the plaintiff, has been its president and majority shareholder.

5 3. Prior to January 3, 1932 the total issued capital stock of the company consisted of 10,000 shares of common capital stock having a par value of $10.00 a share.

The actual and record ownership of the stock was as follows:

Shinsaku Nagano	6210 shares
Kaku Nagano (plaintiff herein)	3780 shares
Y. S. Miya (brother of plaintiff)	10 shares
Total issued shares	10,000 shares

4. On January 3, 1932 at a duly authorized meeting of the shareholders of The Fuji Trading Company, a stock dividend of 5,000 shares was authorized to be declared payable to the holders of record on that date; and on the same date at a duly authorized meeting of the Board of Directors of the company a resolution was passed declaring the dividend aforesaid. The resolution of the shareholders authorizing the dividend was in words and figures as follows:

> "Upon motion duly made and seconded and by vote of all the stockholders present, the following resolution was adopted:
>
> "Resolved, That the Board of Directors of the Company be, and they are hereby authorized to declare a stock dividend aggregating $50,000.00, and to distribute same among the stockholders of the Company in proportion to their holdings."

The resolution of the directors declaring the dividend was in words and figures as follows:

> "Resolved, that a stock dividend aggregating $50,000.00 is hereby declared payable to the stockholders of record, January 3, 1932, said stock dividend to be distributed to the stockholders in proportion to their present stockholdings."

The holders of record on January 3, 1932 and the amounts of their holdings were as heretofore set forth in paragraph 3. By virtue of said dividend, the record ownership of the stock of The Fuji Trading Company became as follows:

6

Name	Original Holding	Proportionate Shares of Dividend	New Holding
Shinsaku Nagano	6210	3105	9315
Kaku Nagano	3780	1890	5670
Y. S. Miya	10	5	15
	10000	5000	15000

No stock dividends were declared nor were any transfers made of the capital stock of the company from the date of the dividend of January 3, 1932, except as hereinafter alleged.

5. Stock certificates for the proportionate amounts of said dividend were never issued to the respective shareholders as authorized and directed by the above resolutions, but instead a single certificate, being certificate No. 59 dated April 1, 1932, for 5,000 shares was issued in the name Kaku Nagano and thereafter retained in the possession of Shinsaku Nagano, husband of the plaintiff. Said certificate was never actually or constructively delivered to plaintiff, Kaku Nagano.

6. Plaintiff has never, at any time, had any knowledge of the above mentioned stock dividend declared in the year 1932 nor of the issuance in her name in 1932 of the above mentioned certificate for 5,000 shares, except insofar as she became informed by virtue of interrogatories propounded to her in certain depositions taken at the office of the Consul of the United States of America at Yokohama, Japan, under a commission issued in the proceedings pending in the United States District Court for the Northern District of Illinois, Eastern Division, entitled Shinsaku Nagano, Plaintiff *vs.* James E. Markham, as Alien Property Custodian, defendant, General Number 45 C 700.

7. Plaintiff further states the fact to be that the above allegations of fact set forth in the foregoing Paragraphs 3, 4, and 5 of this complaint are made on behalf of plaintiff by her counsel as her duly authorized agent and do not represent matters within the personal knowledge of plaintiff but are based upon the knowledge of her attorney as to the corporate records of The Fuji Trading Company and of his knowledge of the matters alleged and proved in open court in the above mentioned case of Shinsaku Nagano *vs.* James E. Markham, as Alien Property Custodian, wherein plaintiff's counsel herein appeared of record for the plaintiff in that case.

8. The facts of plaintiff's residence in and temporary absence from the United States are as follows:

(a) In January, 1914, plaintiff, then residing in Tokyo, Japan, married Shinsaku Nagano, then a permanent resident of the United States. Following the birth of a daughter, Masako, in Japan in November, 1914, plaintiff immigrated to the United States in the month of January, 1915

as a permanent resident, leaving her child in the care of its grandmother, plaintiff's mother. In the year 1916, a son, Shigeo, was born to plaintiff and her husband at Chicago, Illinois. In the year 1919, plaintiff, with their son, Shigeo, went with her husband to Japan on a voyage made for the purpose of her husband's recuperation from a severe attack of influenza which he sustained during the epidemic of that year. During this visit to Japan their daughter, Takako, was born, but plaintiff nevertheless returned to the United States with her husband and American born son, Shigeo, leaving their two Japanese born daughters in the care of their grandmother. Plaintiff remained with her husband in Chicago until the year 1924.

8 (b) In 1924, an illness of plaintiff's daughter, Takako, led to a voyage to Japan by the plaintiff and her husband and on this occasion the decision was made for the plaintiff to remain in Japan for the years necessary to provide a Japanese education for the two Japanese born daughters and also for the American born son, such education being necessary in order for the son Shigeo to take his place in his father's importing business and for the daughters because of the lack of marriage prospects except among their own race.

(c) Plaintiff's daughters finished their education and reached marriageable age, Masako in 1932 and Takako in 1937. The expectation of plaintiff and her husband was that their daughters' marriages would take place soon after their education. In Japan such marriages are arranged for by the parent and a friend acting as intermediary, who is called a matchmaker. The presence of the parent with the unmarried daughter is indispensable. Contrary to the hopes of plaintiff and her husband the anticipated marriage could not be arranged, primarily because so many of the young men were away in the army. In spite of plaintiff's most anxious efforts since 1932, Takako's marriage was not arranged until 1941. Masako is still unmarried and is past the age ordinarily accepted for marriage.

(d) During the years in which plaintiff was obliged to remain in Japan (the United States Immigration Act of 1924 took away the right to bring the daughters to the United States) her husband remained physically present in and a permanent resident of the United States, at Chicago, Illinois. Plaintiff considered her home to be with her

husband at Chicago, Illinois, and as clearly evidenced throughout the large file of correspondence between plaintiff and her husband (as subpoenaed by the Justice
9 Department during the above mentioned suit of Shinsaku Nagano *vs.* James E. Markham, as Alien Property Custodian), plaintiff has consistently retained her intention to return to her husband and her Ameri in residence at the earliest date possible. In the meantime plaintiff's husband has visited plaintiff in Japan for a period of several months in each and every year since her departure from the United States in the year of 1924, save only for the years 1932 and 1933, in which she was in the United States, and save also for the war years commencing 1942. Plaintiff's husband was last with her for seven months in the year 1941.

(e) Plaintiff has at all times remained loyal to the United States and has not engaged in trade with Japan or participated in the Japanese war effort. During the war plaintiff was inactive and lived with her unmarried daughter Masako in their cottage in Shizuoka.

(f) For the foregoing reasons plaintiff's absence from the United States must, as a matter of law, be considered a temporary and involuntary absence occasioned by family obligations which plaintiff had no alternative but to perform. Such absence was not for the purpose of trading in Japan nor for the purpose of residing in Japan.

(g) On the foregoing facts, plaintiff states that she is neither an "enemy" within the meaning of the Trading with the Enemy Act, nor a national of a designated enemy country.

9. On or about February 2, 1943, the defendant's predecessor, Leo T. Crowley, as United States Alien Property Custodian, entered a purported vesting order under the authority of the Trading with the Enemy Act as amended under the terms of which purported order he found,
10 among other things, the following: that the plaintiff, Kaku Nagano, was a national of a designated enemy country, to-wit, Japan; that 8780 shares of $10 par value common capital stock of The Fuji Trading Company were registered in the name of and owned by said Kaku Nagano, and that 58.5% of all of the stock of the company were thus controlled by such national of a designated enemy country and thereupon her, by said order, purported to vest in himself as Alien Property Custodian said 8780 shares of stock of the company and to undertake the direc-

tion, management, supervision and control of the corporation. A copy of the purported vesting order is attached hereto, marked "Plaintiff's Exhibit 1", and made a part hereof.

10. Said Shinsaku Nagano complied with the provisions of the purported vesting order and on March 31, 1943, and under protest, delivered to the Federal Reserve Bank of New York for the account of the Alien Property Custodian three certificates for a total of 8780 shares of the capital stock of The Fuji Trading Company representing the certificates formerly outstanding in the name of Kaku Nagano: Certificate No. 60 being for 5670 shares representing the total number of shares actually owned by Kaku Nagano, and certificate No. 61 being for 3105 shares representing the shares in question which should properly stand in the name of the husband of plaintiff, Shinsaku Nagano, and Certificate No. 62 for 5 shares which should properly stand in the name of Y. S. Miya as his proportionate shares of the stock dividend in question.

11. On or about December 4, 1947, being within the time permitted by law, plaintiff filed with the defendant, Tom C. Clark, Attorney General of the United States as successor to the Alien Property Custodian, upon the form provided by the Custodian and in accordance with the authority of the Trading with the Enemy Act as amended, her Notice of Claim arising as a result of said purported vesting order. A copy of said Notice of Claim is attached hereto, marked "Plaintiff's Exhibit 2" and by reference made a part hereof.

12. The complaint of Shinsaku Nagano heretofore filed in this court, as hereinabove set forth, presented to the court for decision two primary issues which are pending and undisposed of, that is to say, (1) the issue of the ownership of 3105 shares of The Fuji Trading Company of said shares constituting a portion of the 5,000 share stock dividend declared on January 3, 1932; and (2) the issue of whether the plaintiff herein, Kaku Nagano, is a "national of a designated enemy country" within the meaning of the Trading with the Enemy Act and the Executive Regulations promulgated under the purported authority thereof. In accordance with the statement contained in the Notice of Claim hereto attached as "Plaintiff's Exhibit 2", plaintiff does not by this her complaint claim that said 3105 shares were given to her but on the contrary joins in the allegation of said Shinsaku Nagano that said

shares were never at any time out of his possession and complete control; and that plaintiff never knew of the issuance of said shares, as hereinabove alleged in Paragraph 6 of this complaint; but if the court shall determine as a finding of fact or as a conclusion of law that said shares become the property of this plaintiff, then said shares should be returned to her on the ground aforesaid that she is not a "national of a designated enemy country," and upon the further ground that the definitions provided
12 in the statute and in the Executive Regulations promulgated thereunder were never intended to apply to loyal resident aliens such as plaintiff regardless of any temporary physical absence from the United States.

Plaintiff further alleges that she will be caused irreparable damage by the wrongful seizure, confiscation and proposed sale of any shares of stock owned by her in The Fuji Trading Company, particularly in the event that such seizure and sale may have the effect of taking the control of said corporation out of the family union, and plaintiff respectfully represents that she is entitled to an order from this Honorable Court restraining such seizure, confiscation and proposed sale.

13. Plaintiff has not made application to the President for the delivery of said shares to her or for other relief as authorized under the provisions of section 9(a) of the Trading with the Enemy Act as amended, and is accordingly authorized under said section to proceed with this suit having filed her notice of claim with the United States Alien Property Custodian as more particularly hereinabove alleged.

Wherefore, plaintiff prays:

1. That the defendant, Tom C. Clark, Attorney General of the United States, as successor to the Alien Property Custodian, may be enjoined from selling or disposing of any stock, property, or other rights claimed by him to have been acquired under said purported vesting order pending the final determination of this proceeding.

2. That the Court may determine that the plaintiff is neither an enemy ally of enemy, nor a "national of a designated enemy country" within the meaning of the Trading with the Enemy Act and the Executive Regulations promulgated under the purported authority thereof, but that on the contrary she is a permanent resident of the
13 United States entitled to readmission under the Sev-

enth Proviso of Section 3 of the Immigration Act of 1917 (U. S. Code, Title 8, Sec. 136(p)) to the effect that any alien having resided in the United States for more than seven consecutive years may return from an absence regardless of its duration if it be established that the alien has not relinquished such domicile.

3. That the Court may order and decree the return to plaintiff as a loyal resident alien of all shares of The Fuji Trading Company which the Court may determine to be the property of plaintiff.

4. That the Court may grant such other and further relief as to the Court may seem meet.

C. Lysle Smith,
Attorney for Plaintiff.

C. Lysle Smith,
Attorney for Plaintiff,
38 So. Dearborn Street,
Chicago, Illinois.
Ran. 0260

14 "Plaintiff's Exhibit 1."

UNITED STATES OF AMERICA.

OFFICE OF ALIEN PROPERTY CUSTODIAN.

Vesting Order Number 813.

Re: Fuji Trading Company, Inc.

Under the authority of the Trading with the Enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, the undersigned, after investigation:

1. Finding that Kaku Nagano, whose last known address is Tokyo, Japan, is a national of a designated enemy country (Japan);

2. Finding that 8,780 shares of $10 par value common capital stock of Fuji Trading Company, Inc., an Illinois corporation, Chicago, Illinois, are registered in the name of and owned by said Kaku Nagano;

3. Finding that said corporation is a business enterprise within the United States and that said 8,780 shares constitute a substantial part (namely, 58.5%) of all outstanding capital stock of said business enterprise and are evidence of control thereof;

4. Determining, therefore, that said business enterprise

is controlled by said Kaku Nagano and is a national of a designated enemy country (Japan);

5. Determining that to the extent that such nationals are persons not within a designated enemy country, the national interest of the United States requires that such persons be treated as nationals of the aforesaid designated enemy country (Japan);

6. Having made all determinations and taken all action, after appropriate consultation and certification, required by said Executive Order or Act or otherwise; and

7. Deeming it necessary in the national interest;

hereby (i) vests in the Alien Property Custodian the shares of stock described in subparagraphs 2 hereof to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States, and (ii) undertakes the direction, management, supervision and control of such business enterprise to the extent deemed necessary or advisable from time to time by the undersigned.

Such property, and any or all of the proceeds thereof, shall be held in an appropriate special account or accounts, pending further determination of the Alien Property Custodian. This shall not be deemed to limit the powers of the Alien Property Custodian to return such property or the proceeds thereof or to indicate that compensation will not be paid in lieu thereof, or to vary the extent of such direction, management, supervision or control or to terminate the same, if and when it should be determined that any of such action should be taken.

Any person, except a national of a designated enemy country, asserting any claim arising as a result of this order may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on Form APC-1, within one year from the date hereof, or within such further time as may be allowed by the Alien Property Custodian. Nothing herein contained shall be deemed to constitute an admission of the existence, validity or right to allowance of any such claim.

The terms "national", "designated enemy country" and "business enterprise within the United States" as used herein shall have the meanings prescribed in Section 10 of said Executive Order.

Executed at Washington, D. C. on February 2, 1943.

(Signed) Leo T. Crowley,

(Official Seal) *Alien Property Custodian.*

16 "Plaintiff's Exhibit 2."

Claimant's Copy.

Do Not Write In This Space

Claim No.
V. O. No.
Account No.

UNITED STATES OF AMERICA.

OFFICE OF ALIEN PROPERTY CUSTODIAN.

Notice Of Claim For Return Of Property.

Note.—All answers to questions on this form (except names and addresses) must be in English. Amounts of money must be stated in dollars. Copies of documents must be accompanied by English translations. This notice is repeated below in French and in German.

Avis: Toutes les réponses aux questions ci-dessous doivent être faites en anglais, sauf en ce qui concerne les noms et adresses. Le montant des sommes doit être indiqué en dollars (États-Unis). Une traduction en anglais doit être jointe à chaque document.

Zur Kenntnisnahme: Alle Antworten auf die Fragen auf diesem Formular (mit Ausnahme von Namen und Adressen) müssen in englischer Sprache gegeben werden. Geldeträe müssen in Dollars (Amerikanische Währung) angeführt werden. Falls Abschriften von Schriftstücken unterbreitet werden, müssen Übersetzungen in englischer Sprache beigefügt werden.

Please read the accompanying explanation and instructions before filling out the form.

1. (a) Claimant's name Kaku Nagano
   (b) Address 1032 North Dearborn Street, Chicago, Illinois (See Supplement).
   (c) Has claimant filed any other form claiming the same property? Yes No X
   If yes, give date on which claim was filed, and claim number (if known)

2. (a) Claimant's agent (if any) C. Lysle Smith
   (b) Agent's address 38 South Dearborn Street, Chicago, Illinois.
   (c) Is agent authorized to receive payment of money or delivery of property, if returned? Yes X No If yes, an original power of attorney must be attached. Filed herewith.

3. Fees for prosecuting this claim Reasonable attorney's fees based on extent of services required and not in excess of amount permitted by law.

4. Value of property claimed Estimated value, $75,000.00.

5. Payments for material or services supplied, or patents licensed, to or for the United States Government
   Not applicable.

6. Vesting order by which the Alien Property Custodian acquired the property (if known) No. 813

7. Identification of property claimed See Supplement.

8. Are claimant's rights in the property subject to any condition or encumbrance? Yes X No
   See Supplement.

9. Characterization of claimant.—Answer this item by filling out schedule 9A or 9B. If the claim is filed by an individual, fill out schedule 9A, describing him. If the claim is filed by a group of individuals (such as co-owners or partners), fill out a separate schedule 9A for each member of the group. If the claimant is a corporation or association, fill out schedule 9B.

10. Owner of property on vesting date.—
    (a) Give the vesting date February 2, 1943.
    (This means the date when the Alien Property Custodian took over the property which you are now claiming. If you do not know that date, use the approximate date on which your property was taken, followed by the word "approximately." If you do not know even the approximate date, write "December 7, 1941," and use this as the vesting date in answering questions in this item and in item 11.)

(b) Check the one of the following statements which applies to your claim:

X (1) The claimant was the owner of the property on the vesting date.

(2) The claimant is the legal representative or successor of an individual who owned the property on the vesting date.

(3) The claimant is the legal representative or successor of a corporation which owned the property on the vesting date.

(If you checked number (1) above, do not use schedules 10A or 10B, but go directly to item 11. If you checked number (2) above, fill out schedule 10A. If you checked number (3) above, fill out schedule 10B.)

11. Chain of title to property.—Describe below the last transfer of title to the property. (Omit any transfer already described in Schedule 10A or 10B.)

(a) Date Miscellaneous dates from 1923 to 1932.
(b) By whom transferred Shares issued by Fuji Trading Co. to Kaku Nagano.
(c) To whom transferred See 11(b).
(d) Nature and terms of transfer See Supplement.
(e) Consideration actually paid See Supplement; to be paid
(f) If officially recorded or registered, give citation Not applicable.

If there have been any other transfers of the property since March 1, 1938, give the same information about these other transfers, using a supplement.

Attach a copy of each document of title, and of any contract pursuant to which a transfer was made, to each copy of your form. Photographic copies are preferred. If documents are in a foreign language, English translations must also be attached.

12. Other relevant information.—If there are any other facts of which you want to advise the Custodian, write them on a separate sheet of paper under the heading "Supplement to item 12." You may also attach copies of any documents not previously referred to, and mark them in the same way. See Supplement.

13. Affidavit.—The undersigned makes the following declaration under the penalties of perjury and false swearing:

(a) Check the one of the following statements which applies, and strike out the others:

(1) I am the claimant named in item 1.

X (2) I am the claimant's agent, authorized by the attached power of attorney.

(3) I am an officer of the claimant corporation, holding the position of

(b) The facts set forth in the foregoing form and in all attached supplements and schedules are true, and all attached documents are true copies of the originals, to the best of my knowledge and belief.

(c) I have no knowledge of any fact called for by the foregoing form, schedules, and instructions which is not fully set forth.

(d) To the best of my knowledge and belief, the property claimed was not at any time after September 1, 1939, held or used pursuant to any arrangement to conceal any interest of an enemy of the United States.

Kaku Nagano,
Claimant,
By /s/ C. Lysle Smith,
Her Attorney in Fact.
C. Lysle Smith.

14. Notarization.—The foregoing declaration was subscribed and sworn to (or affirmed) before me this 3d day of December, 1947.

Ruth Gifford,
(Seal) *Notary Public.*

17 Original.

Schedule 9A.

(Supplementing Form APC—1A, Item 9.)

Characterization Of Individual Claimant.

(a) Name Kaku Nagano.
(b) Date of birth September 18, 1892.
(c) Place of birth Miko Shimizu, Japan.
(d) If claimant has been outside the United States (including its Territories and possessions) at any time since December 7, 1941, give the name of each country in which he was present, and the principal address at which he stayed in that country, as follows:
Country Japan from prior to 12/7/41 to present date. See Supplement.
Address Shizuoka.
(e) Has the claimant transacted any business since December 7, 1941, personally or by agent, in Germany, Japan, Italy, Hungary, Rumania, or Bulgaria? Yes No X.
(If yes, explain fully in a supplement.)
If the claimant has ever been a citizen of Germany, Japan, Italy, Hungary, Rumania, or Bulgaria, answer also the following question (other persons do not answer):
Has the claimant transacted any business since December 7, 1941, personally or by agent, in territory occupied by any of these nations? Yes No X
(If yes, explain fully in a supplement.)
(f) Claimant's present citizenship (name of country) Japan.
Explain below how your citizenship was acquired—by birth, marriage, naturalization, etc., and give the date. Naturalized citizens should give the number of their naturalization papers. Stateless persons should cite the official act by which they were deprived of citizenship, and supply a copy if possible.
Citizenship acquired by birth.
If the date given above is after December 7, 1941, explain below how your prior citizenship status was acquired: Not applicable.

18 Supplement Attached To And Made A Part Of Notice of Claim of Kaku Nagano For Return Of Property.

1.(b) Claimant is physically present in Japan for the reasons explained below in answer to Item 12 but her permanent residence address is Chicago, Illinois, with her husband, Shinsaku Nagano, who now resides at 1032 North Dearborn Street.

7. The property claimed consists of 8,780 shares of the capital stock of Fuji Trading Company, a corporation of Illinois, subject, however, to the following proviso: The claimant claims as her own only 5,670 of the above shares but there is now pending in United States District Court for the Northern District of Illinois, Eastern Division, in the proceedings entitled, "Shinsaku Nagano, Plaintiff *vs.* Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian, Defendant," General No. 45 C 700, a claim by Shinsaku Nagano (husband of this claimant) as owner of 3,105 of said 8,780 shares, in which proceeding there is pending and undetermined the issue of whether or not Shinsaku Nagano still owns said shares or transferred the same to this claimant as a gift; and if, in said proceedings, it shall be determined by the Court that this claimant is the owner of said 3,105 shares, then, anything hereinbefore to the contrary notwithstanding, this claimant claims as her own the entire 8,780 shares; but if in said proceedings it shall be determined by the Court that said 3,105 shares are the property of Shinsaku Nagano, then this claimant claims as her own only 5,670 of said shares.

8. Item 8 is answered "yes" by reason of the matters hereinafter set forth in answer to Item 7.

9A. The claimant has been temporarily in Japan for reasons of family necessity as given in detail in the statement at Item 12.

11.(d) 3,780 of said shares issued prior to 1932 in
19 part as dividend shares and in part as subscription shares paid for by Shinsaku Nagano. The remaining 5,000 of said 8,780 shares issued April 1, 1932 to claimant contrary to the terms of a 5,000 share stock dividend declared January 3, 1932 to shareholders of record in proportion to their shareholdings.

11.(e) See answer to Item 11.(d).

12. Detailed Statement of Nature of Claim.

Pursuant to Vesting Order No. 813, the Alien Property

Custodian has seized 8,780 shares of the Fuji Trading Company, which shares were represented by certificates standing in the name of the claimant, Kaku Nagano.

Claimant's husband, Shinsaku Nagano, has heretofore filed his individual claim to 3,105 of the above 8,780 shares, upon the ground that said 3,105 shares belonged to him under the terms of their issue as a stock dividend in 1932, and that no present gift of said shares was intended and none was consummated at the time said Shinsaku Nagano caused a certificate for said shares to be issued in the name of claimant herein, Kaku Nagano. This claim is now pending in the United States District Court as set forth in answer to Item 7.

The within claim is not intended to be in conflict with the claim of Shinsaku Nagano, but is based upon the ground that the seizure by the Alien Property Custodian of any shares belonging to Kaku Nagano was unauthorized and contrary to law, for the reasons hereinafter set forth, and that accordingly all shares seized by the Custodian, which are not restored to Shinsaku Nagano as a result of his claim, should be returned to the claimant herein, Kaku Nagano.

The ground upon which the claimant herein, Kaku Nagano, contends that the seizure of the shares of stock in Fuji Trading Company belonging to her was improper and contrary to law, is that claimant was and is a permanent resident of the United States who maintained a domicile in the United States for more than seven consecutive years, and has never relinquished her domicile in this country.

The claimant further states that her absence from the United States, although prolonged, has at all times been temporary and not for the purpose of trading with the enemy or relinquishing her United States domicile. By virtue of the foregoing, claimant alleges that as a matter of law, she is not an "enemy" within the meaning of the Trading with the Enemy Act, as amended, nor a "national of a designated enemy country," within the meaning of the several Executive Orders in amplification of the Trading with the Enemy Act. Claimant further states that her temporary absence from the United States did not make her position substantially different from that of her husband, Shinsaku Nagano, in whose possession remained the shares of stock belonging to claimant herein, and that said Vesting Order was accordingly contrary to the statute.

The facts of claimant's residence in and temporary absence from the United States are as follows:

1. In January, 1914, claimant, then residing in Tokyo, Japan, married Shinsaku Nagano, then a permanent resident of the United States. Following the birth of a daughter, Masako, in Japan in November, 1914, claimant immigrated to the United States in the month of January, 1915 as a permanent resident, leaving her child in the care of its grandmother, claimant's mother. In the year 1916, a son, Shigeo, was born to claimant and her husband at Chicago, Illinois. In the year 1919, claimant with their son, Shigeo, went with her husband to Japan on a voyage made for the purpose of her husband's recuperation from a severe attack of influenza which he sustained during the epidemic of that year; during this visit to Japan their daughter,
21 Takako, was born, but claimant nevertheless returned to the United States with her husband and American born son, Shigeo, leaving their two Japanese born daughters in the care of their grandmother. Claimant remained with her husband in Chicago until the year 1923.

In 1923, an illness of claimant's daughter, Takako, led to a voyage to Japan by the claimant and her husband and on this occasion the decision was made for the claimant to remain in Japan for the years necessary to provide a Japanese education for the two Japanese born daughters and also for the American born son, such education being necessary in order for the son Shigeo to take his place in his father's importing business and for the daughters because of the lack of marriage prospects except among their own race.

Claimant's daughters finished their education and reached marriageable age, Masako in 1932 and Takako in 1937. The expectation of claimant and her husband was that their daughters' marriages would take place soon after their education. In Japan such marriages are arranged for by the parent and a friend acting as intermediary, who is called a matchmaker. The presence of the parent with the unmarried daughter is indispensable. Contrary to the hopes of claimant and her husband the marriages could not be arranged, primarily because so many of the young men were away in the army. In spite of claimant's most anxious efforts since 1932, Takako's marriage was not arranged until 1941. Masako is still unmarried and is past the age ordinarily accepted for marriage.

During the years in which claimant was obliged to remain in Japan (the United States Immigration Act of 1924 took away the right to bring the daughters to the United States) her husband remained a permanent resident of the United States. Claimant considered her home to be with her husband in the United States and as clearly evidenced
22 throughout the large file of correspondence between claimant and her husband (as subpoened by the Justice Department during the pending litigation) claimant has consistently retained her intention to return to her husband and her American residence at the earliest date possible. In the meantime claimant's husband has visited claimant in Japan for a period of several months in each and every year since her departure from the United States in the year of 1924, save only for the years 1932 and 1933, in which she was in the United States, and save also for the years commencing 1942. (Claimant's husband was last with her for seven months in the year 1941.)

C. Lysle Smith, as attorney in fact for the claimant, further states that contemporaneously with his receipt of the Power of Attorney executed by claimant as annexed to this claim, he also received two photographs of claimant taken since the War; that he is personally acquainted with claimant and her older daughter, Masako, both Mrs. Nagano and said older daughter having been in the office of this attorney in fact and also having visited his home during the period of Mrs. Nagano's return to the United States during the years 1932 and 1933; that wartime restrictions not yet removed still prevent the return of claimant to the United States and that in view of the extended period of claimant's physical absence from the United States and her still existing inability to present herself personally to the Justice Department or the Court if need be in support of her claim herewith presented, there are attached hereto said photographs of claimant marked respectively "Exhibit A" and "Exhibit B"; "Exhibit
23 A" consisting of a photograph of claimant and her older daughter, Masako, and "Exhibit B" consisting of a photograph of claimant her said two daughters, Takako and Masako, together with claimant's grandchild, the child of her daughter, Takako.

Claimant has at all times remained loyal to the United States and has not engaged in trade with Japan or participated in the Japanese war effort. During the war

claimant was inactive and lived with her unmarried daughter Masako in their cottage in Shizuoka.

For the foregoing reasons claimant's absence from the United States must, as a matter of law, be considered as a temporary and involuntary absence occasioned by family obligations which claimant had no alternative but to perform. Such absence was not for the purpose of trading in Japan nor for the purpose of residing in Japan.

On the foregoing facts, claimant states that she is neither an "enemy" within the meaning of the Trading with the Enemy Act, nor a national of a designated enemy country.

This claim is made under the appropriate provisions of the Trading with the Enemy Act including particularly the provisions of Section 9(a) as amended, and including all other applicable provisions of the Act which are not inconsistent with the rights conferred upon claimant under said Section 9(a).

Kaku Nagano,
By /s/ C. Lysle Smith,
Her Attorney in Fact.

"EXHIBIT A"

26 State of Illinois, } ss.
County of Cook. }

Affidavit In Re Diligence Of Claimant In Filing Of Claim.

C. Lysle Smith, being first duly sworn on oath deposes and says that as attorney in fact for the claimant, Kaku Nagano, he has executed the Notice of Claim to which this affidavit is attached.

Affiant further says that the time for filing said claim does not expire until August 8, 1948, but due to the fact that the companion claims of Shinsaku Nagano (being claims No. 488, filed March 11, 1943 and No. 6215 filed December 23, 1946, both included in the suit of Shinsaku Nagano under Section 9(a) of the Trading with the Enemy Act, case No. 45 C 700, now pending and undisposed of in the United States District Court for the Northern District of Illinois, Eastern Division) have heretofore been presented and tried before the Vested Claims Committee of the Alien Property Custodian and before the United States District Court, it is considered urgent by this affiant to call to the attention of the Justice Department through the medium of this affidavit the fact that there has been no lack of diligence on the part of the claimant or her attorney in the prompt filing of her claim and to disclose the reasons why it has not heretofore been possible to file the within claim so that it might have been originally tried and disposed of together with said claim of Shinsaku Nagano.

Affiant further says that in the month of December, 1946 (being previous to the trial in the month of January, 1947 of said claim of Shinsaku Nagano) this affiant prepared and forwarded to Japan, for execution by said
27 Kaku Nagano, the original Power of Attorney which is dated and acknowledged before the United States Consul at Yokohama, Japan on January 4, 1947 and now attached to the within claim; that notwithstanding the execution of said Power of Attorney on the date aforesaid the wartime restrictions relating to the transmission of commercial documents prohibited the forwarding of said Power of Attorney to affiant so that the same was not received until on or about October 1, 1947. Previous to

the receipt of said Power of Attorney affiant had no written authority from said Kaku Nakano as required by the regulations of the Alien Property Custodian and could not obtain any such authority.

Further affiant sayeth not.

/s/ C. Lysle Smith.

Subscribed and Sworn to before me this 3rd day of December, A. D. 1947.

/s/ Ruth Gifford,
Notary Public.

(Seal)

28 Certificate of Acknowledgment of Execution of Document.

Japan
(Country)
City of Yokohama
(County or other political division)
American Consular Service
(Name of consular office)
} ss.

Meredith Weatherby, Consul of the United States of America at Yokohama, Japan, duly commissioned and qualified, do hereby certify that on this 4th day of January, 1947, before me personally appeared Kaku Nagano, to me personally known, and known to me to be the individual described in, whose name is subscribed to, and who executed the annexed instrument, and being informed by me of the contents of said instrument does duly acknowledge to me that she executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and official seal the day and year last above written.

/s/ Meredith Weatherby,
Consul of the United States of America.

(Seal)

29 Power of Attorney.

Know All Men By These Presents, That I, Kaku Nagano, of Chicago, Illinois, but temporarily residing in Shizuoka, Japan, do hereby constitute and appoint Shinsaku Nagano, C. Lysle Smith and John Alden Powers, and each of them, jointly and severally, my true and lawful attorneys for me and in my name, place and stead,

1. To demand, sue for, collect, recover and receive all claims, monies, securities, interest and demands whatsoever now due or that may hereafter be due or belong to me, and to make, execute and deliver receipt, releases or other discharges therefor, under seal or otherwise;

2. To sell any and all shares of stock now or hereafter belonging to me, and to make, execute and deliver an assignment or assignments of any such shares of stock;

3. To appear for and represent me before the United States Department of Justice in connection with any claim which I may have or assert under the provisions of the Trading with the Enemy Act, or otherwise, in relation to any property of mine, including any shares of stock which I may own in Fuji Trading Co., an Illinois corporation, which property the United States Alien Property Custodian may have vested or claimed to vest; and also before the United States Immigration Service Division of said United States Department of Justice, or before the United States Department of State, or any other department which may have jurisdiction or authority over my status and rights under the immigration laws of the United States;

and before any unit, division, agent or employee of
30 any of said departments, divisions or bureaus; and

also before the courts of the United States in relation to any of said matters; and to execute and file any claims, notices, legal pleadings, applications, appeals appearances, bonds or any other papers or documents whatever pertaining to any of such matters;

4. To constitute and appoint in the place and stead of any or either of them and as a substitute for any or either of them in any of said matters, one attorney or more for me, with full power of revocation; and

5. Without in anywise limiting the foregoing, generally to do, execute and perform any other act, deed, matter or thing whatsoever that ought to be done, executed and performed, or that in the opinion of my said attorney or

attorneys ought to be done, executed or performed in and about the premises, of every nature and kind whatsoever, as fully and effectually as I could do if personally present.

And I, the said Kaku Nagano, do hereby ratify and confirm whatsoever my said attorney or attorneys, or any or either of them, or his substitute or substitutes, shall do or cause to be done in or about the premises by virtue of this power of attorney.

In Witness Whereof, I have hereunto set my hand and seal in the City of Yokohama, Prefecture of Kanagawa, Japan, on this 4th day of January, 1947.

/s/ Kaku Nagano. (Seal)

In the presence of:
Joseph M. Luring,
Tetsuko K. Suzuki.

31 Endorsed: In the United States District Court. * * (Caption—47-C-1830) * * Complaint in Equity Under Section 9(a) of the Trading With The Enemy Act, As Amended. Filed Dec. 19, 1947 at 2:50 o'clock P. M. Roy H. Johnson, Clerk.

32 And afterwards on, to wit, the 2nd day of March, 1948, came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Motion For Judgment Dismissing The Complaint With Prejudice in words and figures following, to wit:

33 In the United States District Court.
* * (Caption—47-C-1830) * *

MOTION FOR JUDGMENT DISMISSING THE COMPLAINT WITH PREJUDICE.

The defendant by his attorney, Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, moves the Court for judgment dismissing the complaint herein with prejudice on the grounds that the Court lacks jurisdiction of the action and that the complaint fails to state a claim upon which relief can be granted, in that it appears from the face of the complaint and from the annexed copy of the manifest of the S. S. Hiye Maru, certified on April 25, 1946 by Joseph Savoretti, Assistant

Commissioner, Immigration and Naturalization Service, that:

(1) the jurisdiction of this Court purports to be invoked and the claim purports to arise under the Trading With the Enemy Act, as amended;

(2) the plaintiff is an enemy within the definition of the said Act and, therefore, cannot maintain this suit under the said Act; and

34 (3) the plaintiff is a national of a designated enemy country (Japan) within the meaning of Executive Order No. 9193 (7 F. R. 5205) and, therefore, cannot maintain this suit under the said Act.

Dated:

Otto Kerner, Jr.,
United States District Attorney for the Northern District of Illinois,

David L. Bazelon,
Assistant Attorney General, Director, Office of Alien Property,

Thomas E. Harris,
Special Assistant to the Attorney General,

George B. Searls,
Chief Trial Attorney,

Harold Ungar,
Attorney,

United States Department of Justice,
Washington 25, D. C.,
Attorneys for Defendant.

35 UNITED STATES OF AMERICA.

Department of Justice,

Immigration and Naturalization Service.

April 25, 1946.

Pursuant to Title 28, Section 661, U. S. Code (Sec. 882, Revised Statutes), I Hereby Certify that the annexed document is a true copy of the manifest of the SS Hiye Maru which arrived at the port of Seattle, Washington on September 20, 1932, in so far as it relates to Kaku Nagano and Shinsaku Nagano, the original of which is contained in the records of the Immigration and Naturalization Service, Department of Justice, file No. 17472-2.

In Witness Whereof I have hereunto set my hand and caused the seal of the Department of Justice, Immigration and Naturalization Service, to be affixed, on the year and day first above written.

Joseph Savoretti,

(Seal) *Assistant Commissioner, Immigration and Naturalization Service.*

LMS/ltf

List 2

LIST OR MANIFE

ALL ALIENS arriving at a port of continental United States from a foreign port or a port of the

S. S. _____ . Passengers

1	2	3		4	5	6	7	8		9
No. on List	HEAD-TAX STATUS (To be filled in by an official)	NAME IN FULL		Age		Sex	Calling or occupation	Able to		Nationality. Country of which citizen or subject
		Family name	Given name	Yrs.	Mos.			Read (or spell his name if a stranger should ask him this)	Write	
3		Left U.S. via Cuba Dec. 6-20-22						"Conte Rosso"		
4		Left U.S. via Cuba Dec. 6-20-22						"Conte Rosso"		

Ray Ellis
Los Angeles

Total passengers . . . . .
U.S. citizens . . . . .
Aliens . . . . .

List 7

LIST OR MANIFEST OF ALIEN PASSENGERS FOR THE UNITED

ALL ALIENS arriving at a port of continental United States from a foreign port or a port of the insular possessions of the United States, and all aliens arriving at a port of said insular possessions from a foreign port, a part of continental United
This (pink) sheet is for the listing of

S.S. _____ . Passengers sailing from _____ , 19__

1	2	3		4	5	6	7	8		9	10	11		12	13		14		15	
No.	HEAD-TAX STATUS (The column for use of Government officials only)	NAME IN FULL		Age			Calling or occupation	Able to —		Nationality (Country of which citizen or subject)	† Race or people	Place of birth		Immigration Visa (Passport Visa, or Reentry Permit number	Issued		Date immigration certificate of landing, etc. (This column for use of Government officials only)	*Last permanent residence	
		Family name	Given name	Yrs.	Mos.	Sex; Married or single		Read	Write (express in a complete sentence in the space)			Country	City or town, State, Province or District	Date, number, and port of issue (if an alien)	Place	Date		Country	City or town, State, Province or District
3		Left U.S. on ma boat L. 6-20-33																		
4		Left U.S. on ma boat L. 6-20-33																		

All

Roy Wilcox
2:7 Wilson

Judgment

Total passengers . . . . .
U.S. citizens . . . . .
Aliens . . . . .

* Permanent residence within the meaning of this manifest shall be actual or intended not
† List of races will be found on the back of this sheet.

List 6.

STATES IMMIGRATION OFFICER AT PORT OF ARRIVAL

FIRST-CABIN PASSENGERS ONLY

Arriving at Port of Seattle, Wash., Sept., 20th, 19 30.

9	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37
1	[redacted]																										
2	[redacted]																										
3	[redacted]																										
4	[redacted]																										
5	[redacted]																										
6	[redacted]																										
7	[redacted]																										
8	[redacted]																										
9	[redacted]																										
10	[redacted]																										
11	[redacted]																										
12	[redacted]																										
13	[redacted]																										
14	[redacted]																										
15	[redacted]																										
16	[redacted]																										
17	[redacted]																										
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19	[redacted]																										
20	[redacted]																										
21	[redacted]																										
22	[redacted]																										
23	[redacted]																										
24	[redacted]																										
25	[redacted]																										
26	[redacted]																										
27	[redacted]																										
28	[redacted]																										
29	[redacted]																										
30	[redacted]																										

Note.—Full text of section 20 is as follows: Whether a person who is a citizen of or owes allegiance to the country or to any form of government of the United States or of any of its insular possessions, or who is a subject or citizen of any country, state, or government, or political subdivision thereof, whether entering the United States for permanent residence or temporarily, and whether entering as a passenger, or as a member of a railroad crew, or otherwise, and whether admitted or not, who shall be found unlawfully in the United States or any place subject to the jurisdiction thereof, shall be taken into custody and deported in the manner provided by section 19 of this act, upon the warrant of the Secretary of Labor, unless he shall prove to the satisfaction of the Secretary of Labor that he entered the United States prior to July 1, 1924, or that he was not at the time of entry a member of the class of persons excluded by section 13 of this act, or that he was lawfully admitted to the United States for permanent residence, or that he has resided therein continuously since entry, and that he is not at the time of his application for relief under this section a member of any of the classes of persons excluded by section 13 of this act, or that he has been granted a discretionary order of the Secretary of Labor suspending his deportation, or that he has become a naturalized citizen of the United States.

38 And afterwards, to wit, on the 22nd day of December, 1949, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

39 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—47-C-1830) * *

On stipulation of the parties by counsel filed herein it is Ordered that J. Howard McGrath, Attorney General of the United States as Successor to the Alien Property Custodian, be and he is hereby substituted in place and stead of Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian, as defendant in this cause.

40 And afterwards on, to wit, the 16th day of March, 1950, there was filed in the Clerk's office of said Court a certain Memorandum Of The Court in words and figures following, to wit:

41 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—47-C-1830) * *

MEMORANDUM.

Campbell, District Judge.

This is a companion case to Shinsaku Nagano *vs* Tom C. Clark, 45 C 700, in which this court held that Shinsaku Nagano, husband of the plaintiff herein, could not recover 8,780 shares of stock in the Fuji Trading Company which on the books of the corporation had stood in the name of Kaku Nagano, a Japanese national living in Japan, and which had been vested by the Alien Property Custodian in 1943 as the property of a national of a designated enemy country. In the present case, Kaku Nagano brings suit under Section 9(a) of the Trading with the Enemy Act to recover these shares.

The defendant has moved for judgment dismissing the

complaint with prejudice on the ground that the plaintiff, as a "resident within" Japan since 1924, except for a visit to the United States in 1932-33, is an enemy as defined in Section 2 of the Trading with the Enemy Act and hence may not maintain an action under Section 9(a) of the act to establish her right, title and interest in said shares of stock; and that the plaintiff, as a Japanese national, is among the class of persons whose property the President has authorized to be vested and she is therefore sufficiently tainted by enemy associations to be barred, under *Clark* v. *Uebersee Finanz-Korporation,* 332 U. S. 480 (1947), from maintaining this suit.

The plaintiff's opposition to the present motion is based on several grounds. First, plaintiff contends that she should not properly be regarded as an "enemy" under Section 2 of the act because despite her long stay in Japan, her domicile remained in the United States with her husband. She alleges that her long stay in Japan was not really voluntary but was required by the family necessity of giving her three children a Japanese education and of arranging marriages in the Japanese tradition for her two daughters who had been born in Japan and hence were not citizens of the United States. Second, plaintiff argues that the vesting of the property involved here was wholly outside the purposes of the act, since it bore no relation to the ability of this country or of the enemy to wage war.

42 With respect to the first ground of her argument, plaintiff contends that enemy nationality and physical presence are only indicia of enemy character, and that since the decision in *Clark* v. *Uebersee Finanz-Korporation,* 332 U. S. 480 (1947), held that the Government could show the enemy taint attaching to apparently neutral interests, it follows that one who meets the statutory definition of an enemy may show the lack of any real enemy taint. This argument is non-sequitur and, as I read the Uebersee decision, it directly refutes this argument. In that case, the Supreme Court said that the definitions in Section 2 of the Trading with the Enemy Act are "merely illustrative". 332 U. S. at 488-9. Thus it appears clear to me that the meaning of the Uebersee case in this regard is that although the Government may show facts indicating an enemy taint not strictly within the definition of "enemy" in Section 2, facts bringing a party squarely within the statutory definition may not be disregarded.

Next, I think that the facts of this case bring the plaintiff squarely within the statutory definition of "enemy", her long residence in Japan making her a "resident within" the territory of an enemy nation, regardless of the possibility that her domicile remained at all times in the United States where her husband presumably had his domicile. Although it has been held that for one to be "resident within" enemy territory, something more than mere physical presence is required (*Josephberg* v. *Markham*, 152 F. 2nd 644 (CCA 2d 1945)), I do not think that the alleged family necessity relied on by plaintiff as an explanation for her long stay in Japan is sufficient to bring her within cases which have refused to apply the definition of "enemy" literally because of an element of compulsion, or at least of lack of free will, in the case. In the Josephberg case, supra, the court held that the mental incapacity of the alleged "enemy", a naturalized American citizen, made it impossible to say that his prolonged stay in Italy was voluntary; in *Stadtmuller* v. *Miller*, 11 F. 2d 732 (CCA 2d 1926), the court held that a German citizen, a resident of the United States, who in the course of traveling for his health entered Germany to settle his parents' estate on his way back to the United States and was prevented by military regulations from leaving Germany, was a "transient" and hence not a "resident within" Germany. On the contrary, the facts alleged by plaintiff herein show that her residence in Japan was deliberate, whatever its motivation.

The second ground of the plaintiff's argument is based on the premise that the purpose of a suit under Section 9(a) of the Trading with the Enemy Act is to determine whether the vesting of the plaintiff's property served any purpose of the Act, and that such purpose is either to assist the war effort of the United States, or to hamper the war effort of the enemy. In this connection, plaintiff argues that since the corporation whose stock was involved engaged in the manufacture of food sauces, and since control of the corporation was at all times in the hands of the plaintiff's husband in Chicago, this court should hold that the vesting was erroneous because it had no effect on the war effort of either belligerent. Plaintiff's argument, I think, misconstrues both the general purpose of the Act as a war measure and the purpose of a suit to recover vested property under Section 9(a). The scope of the power to vest alien property under the Act is not

limited to property useful as war industries. The purpose of a suit to recover, although a suit in equity, is not to provide judicial review of every aspect of the executive action which vested alien property, but simply to establish a right, title, or interest to the property in
43 one not an enemy or an ally of an enemy. Furthermore, plaintiff's argument that property in friendly hands (i. e., in the hands of plaintiff's husband, a Japanese national resident in the United States) was not intended by Congress to be seized under the Act, if adopted, would virtually destroy the Act, because it is only property in the United States or in territory subject to the jurisdiction of the United States which, as a practical matter, can be seized, and such property will usually, if not always, be in the custody of one at least ostensibly friendly to the United States. It is therefore the enemy ownership of the property which determines whether it can be seized, the attitude of the custodian being immaterial. Obviously, enemy property located in an enemy country would be beyond the effective jurisdiction of the United States to seize; and property present in the United States which is owned by enemy aliens resident in enemy countries will usually, if not always, be in the hands of friendly custodians, since enemy aliens present in the United States and actively hostile to this country would be interned and thus in no position to act as custodians.

The defendant has also called the court's attention to Section 12 of the War Claims Act of 1948 (Public Law 896, 80th Congress, 2nd Sess.) which amends the Trading with the Enemy Act by adding thereto Section 39. This section provides that no property or interest therein of Germany and Japan or of any national of either country vested by any officer or agency of the United States shall be returned to the former owners or their successors and no compensation shall be paid them. The defendant has suggested that this section prevents recovery by the plaintiff herein because she is a national of Japan. I do not think this section is relevant to a case brought under Section 9(a) of the Act. If a plaintiff in a Section 9(a) suit is an enemy or an ally of an enemy, the suit fails under the provisions of Section 9(a), not because of the provisions of the new Section 39. The real purpose of the new Section 39 is indicated by the provision that the net proceeds of property vested under the Act, after administration, liquidation, and disposition pursuant to the

provisions of the War Claims Act of 1948, shall be paid into the Treasury, in which, under Section 13(a) of the War Claims Act of 1948, there is created a trust fund known as the War Claims Fund consisting of all sums paid into the Treasury pursuant to the provisions of Section 39 of the Trading with the Enemy Act. In connection with other sections of the War Claims Act, these sections reveal a third purpose not mentioned by plaintiff among the reason for vesting enemy property, namely, the application of enemy assets to the relief of the victims of enemy aggression.

Since the plaintiff is an enemy as defined in Section 2 of the Trading with the Enemy Act, she cannot maintain a suit under Section 9(a) to recover property vested by the Alien Property Custodian. I have reached this conclusion after considerable study and with some reluctance, since it involves the confiscation of a substantial portion of the life work of the plaintiff's husband. It is unfortunate that Congress, in determining the national policy respecting the vesting of enemy property, has not taken into account the fact that because of its prior immigration and naturalization policy, Japanese have not been able to become naturalized citizens and hence are especially
44 vulnerable to the technical definitions under the Trading with the Enemy Act. A naturalized American citizen in the position of the plaintiff herein might have had constitutional protection against the sweeping definition of "enemy" under the Act. Compare *Josephberg* v. *Markham*, supra.

The defendant's motion is granted, and this action is accordingly dismissed.

Campbell,
Judge.

March 16, 1950.

49 United States of America, } ss.
Northern District of Illinois. }

Certificate of Mailing.

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that on May 12, 1950, in accordance with Rule 73 (b) of the Federal Rules of Civil Procedure a copy of the foregoing Notice of Appeal was mailed to Hon. Otto Kerner, Jr., U. S. Attorney, 450 U. S. Court House, Chicago 4, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 12th day of May, A. D. 1950.

Roy H. Johnson,
Clerk,

(Seal)

By Gizella Butcher,
Deputy Clerk.

50 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—47-C-1830) * *

APPEAL BOND.

Kaku Nagano, Plaintiff-Appellant herein, by C. Lysle Smith, her attorney and duly authorized agent in this behalf, and Maryland Casualty Company, a Maryland Corporation, surety, appearing and submitting to the jurisdiction of the court, hereby undertake for themselves and each of them, their and each of their heirs, executors, administrators, successors and assigns, to make good all taxable costs and charges, not exceeding the sum of $250.00, that the Defendant-Appellee, J. Howard McGrath, Attorney General of the United States, as Successor to the Alien Property Custodian, may be put to or allowed if the appeal is dismissed or the judgment affirmed, or such costs as the United States Court of Appeals for the Seventh Circuit may award if the judgment is modified.

The said surety hereby irrevocably appoints the clerk of this court as its agent upon whom any papers affecting its liability on this undertaking may be served.

51 Signed, sealed and delivered this 11th day of May, 1950.

Kaku Nagano,
Plaintiff-Appellant.
By C. Lysle Smith,
Her attorney and duly authorized agent in this behalf.
Maryland Casualty Company,
Surety,
By Philip Weinstein,
(Seal) *Its duly authorized agent and attorney in fact.*

52 **Certified Copy**

Know All Men By These Presents: That Maryland Casualty Company, a corporation created by and existing under the laws of the State of Maryland, of Baltimore City, Maryland, being authorized by its Charter to transact a general surety, casualty, and fidelity business, and qualified to act as surety on bonds to the United States of America, and authorized to transact its business in the State of Illinois, in pursuance of the authority set forth in Section 13 of Article IV of its By-laws, from which the following is a true extract, and which Section has not been amended nor rescinded:

"The President or any Vice-President may, by written instrument under the attested corporate seal, appoint attorneys-in-fact with authority to execute bonds, policies, recognizances, stipulations, undertakings, or other like instruments on behalf of the Corporation, and may authorize any officer or any such attorney-in-fact to affix the corporate seal thereto,"

does hereby nominate, constitute and appoint Philip Weinstein and Thomas E. Ryan, each with full power to act alone, of Chicago, State of Illinois, its Attorney-in-Fact to make, execute, seal, and deliver on its behalf as Surety, and as its act and deed, any and all bonds, recognizances, stipulations, undertakings, and other like instruments (except bonds guaranteeing leaseholds, charter parties, payment of rentals, treasurers, sheriffs, constables, and public officials collecting taxes.)

Such bonds, recognizances, stipulations, undertakings, or other like instruments shall be binding upon said Company as fully and to all intents and purposes as if such instruments had been duly executed and acknowledged and delivered by the authorized officers of the Company when duly executed by either one of the aforesaid attorneys in fact.

This instrument revokes a power of attorney granted Phillip Weinstein and Thomas E. Ryan of Chicago, Illinois, dated March 23, 1939.

In Witness Whereof, Maryland Casualty Company has

caused these presents to be executed in its name and on its behalf and its Corporate Seal to be hereunto affixed and attested by its officers thereunto duly authorized, this 12th day of July, 1940, at Baltimore City, Maryland.

Maryland Casualty Company,
By (Signed) David C. Gibson,
Vice-President.

(Corporate Seal)

Attest:
(Signed) Wm. H. Krause,
Assistant Secretary.

State of Maryland }
Baltimore City } ss.

On this 12th day of July, A. D. 1940, before the subscriber, a Notary Public of the State of Maryland, in and for Baltimore City, duly commissioned and qualified, came David C. Gibson, Vice-President, and Wm. H. Krause, Assistant Secretary, of Maryland Casualty Company, to me personally known and known to be the officers described in, and who executed the preceding instrument; and they each acknowledged the execution of the same; and, being by me duly sworn, they severally and each for himself deposed and said that they respectively hold the offices in said Corporation as indicated, that the Seal affixed to the preceding instrument is the Corporate Seal of said Corporation, and that the said Corporate Seal, and their signatures, as such officers, were duly affixed and subscribed to the said instrument pursuant to all due corporate authorization.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at Baltimore City, the day and year first above written.

(Notarial Seal) (Signed) J. Wm. Frank,
Notary Public.

My commission expires May 5, 1941.

Overleaf is certificate as to foregoing being a full and correct copy.

Certificate.

I, an Assistant Secretary of the Maryland Casualty Company, do hereby certify that I have compared the copy of the Power of Attorney overleaf with the original now on file among the records of the Home Office of the Company and in my custody, and that the same is a full, true and correct copy, and that the Power of Attorney has not been revoked, amended or abridged, and is now in full force and effect.

Given under my hand as Assistant Secretary, and the Seal of the Company, at Baltimore City, Md., this 11th day of May, A. D. 1950.

(Seal) Lillian A. Algie,
Assistant Secretary.

53 And afterwards on, to wit, the 22nd day of May, 1950, came the Plaintiff-Appellant by his attorneys and filed in the Clerk's office of said Court his certain Statement of Points Relied on Upon Appeal in words and figures following, to wit:

54 In the United States District Court.
* * (Caption—47-C-1830) * *

STATEMENT OF POINTS RELIED ON UPON APPEAL.

Comes now Kaku Nagano, plaintiff-appellant herein, and files the following assignment of errors upon which she will rely in the prosecution of the appeal in this cause from the order of the court dismissing this cause entered on March 16, 1950:

1. The Court erred in dismissing the complaint.

2. The Court erred in finding as a conclusion of law that under the allegations of the complaint plaintiff is an "enemy" within the meaning of the Trading with the Enemy Act.

3. The Court erred in finding as a conclusion of law that under the allegations of the complaint plaintiff is a

person who may not maintain an action under Section 9(a) of the Trading with the Enemy Act to recover her property vested by the Alien Property Custodian.

C. Lysle Smith,
Attorney for Kaku Nagano,
Plaintiff-Appellant.

Dated: May 22, 1950.

Service of the above and foregoing Statement of Points Relied on Upon Appeal accepted and acknowledged this 22nd day of May, 1950.

Otto Kerner, Jr.,
United States Attorney.
Attorney for J. Howard McGrath,
Attorney General, as Successor to
the Alien Property Custodian,
Defendant-Appellee.

And on the same day, to wit, the 22nd day of May, 1950, came the Plaintiff-Appellant by his attorneys and filed in the Clerk's office of said Court his certain Designation of Contents of Record on Appeal in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT.

* * (Caption—47-C-1830) * *

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

To the Clerk of said Court:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Seventh Circuit a transcript of record in the above entitled cause as required by law and by the rules of said Court, and to include in said transcript of record the following documents, or certified copies thereof, to wit:

1. The complaint, filed December 19, 1947.
2. Motion for judgment dismissing the complaint with prejudice filed March 2, 1948.
3. Order entered December 22, 1949, substituting as defendant J. Howard McGrath, Attorney General of the

United States, as successor to the Alien Property Custodian in the place and stead of Tom C. Clark, Attorney General, as successor to the Alien Property Custodian.

4. Memorandum of the court filed March 16, 1950.

5. Order dismissing cause pursuant to memorandum, entered March 16, 1950.

6. Notice of Appeal, filed May 12, 1950.

7. Bond for costs, filed May 12, 1950.

58 8. Order authorizing the Clerk of the United States District Court to detach the original exhibits from the complaint and from the motion of the Defendant for judgment dismissing the complaint and to cause said exhibits to be incorporated in the record on appeal.

9. Statement of points relied on upon appeal.

10. This designation of contents of record on appeal.

11. Clerk's certificate.

C. Lysle Smith,
Attorney for Kaku Nagano, Plaintiff-Appellant.

Dated: May 22, 1950.

Service of the above and foregoing designation of contents of record on appeal accepted and acknowledged this 22nd day of May, 1950.

Otto Kerner, Jr.,
United States Attorney.
Attorney for J. Howard McGrath, Attorney General, as Successor to the Alien Property Custodian, Defendant-Appellee.

59 United States of America, }
Northern District of Illinois. } ss.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation filed in this Court in the cause entitled: Kaku Nagano, Plaintiff, vs. J. Howard McGrath, Attorney General, as Successor to the Alien Property Custodian, Defendant, No. 47-C-1830, as the same appears from the original records and files thereof now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 19th day of June, 1950.

Roy H. Johnson,
Clerk,

(Seal)

By Gizella Butcher,
Deputy Clerk.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

September 18, 1950.

Before:

Hon. Walter C. Lindley, Circuit Judge.

Kaku Nagano, *Plaintiff-Appellant,* vs. J. Howard McGrath, Attorney General, As Successor To The Alien Property Custodian, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

10192

On petition of counsel for the plaintiff-appellant, it is ordered that the record in this cause be supplemented by adding thereto the order of the Immigration and Naturalization Service of the United States Department of Justice finding and determining that petitioner Kaku Nagano has re-entered the United States and that she is a permanent resident of this country whose absence therefrom was temporary only.

It is further ordered that that part of the plaintiff-appellant's petition which seeks the entry of an order remanding the cause to the District Court for entry of an order to return the vested property be, and the same is hereby, denied without prejudice to counsel's right to renew the motion at the time the cause is heard on the merits.

UNITED STATES DEPARTMENT OF JUSTICE.

Immigration and Naturalization Service.

File: A-7415253—Chicago (0900/55907) (No Appeal)

In re: Kaku Nagano Aug. 11, 1950.

In Exclusion Proceedings

In Behalf Of Appellant:

C. Lysle Smith, Esquire
First National Bank Building
Chicago, 3, Illinois

Excluded:

Act of 1924—Not nonquota immigrant as specified in her immigration visa.

Act of 1924—Ineligible to citizenship.

Application: Admission for permanent residence.

Detention Status: Not shown.

Discussion: This record relates to a 57-year-old female, native and citizen of Japan, who arrived from Japan, via plane, and applied for admission at Chicago, Illinois on June 26, 1950. She was found inadmissible on the above grounds by a Board of Special Inquiry and her case has been forwarded for consideration on appeal.

The record establishes that the appellant was first lawfully admitted to the United States for permanent residence on October 27, 1915 (Ex. 2). She then visited Japan for several months and was readmitted to the United States for permanent residence on October 24, 1919 (Ex. 3). The appellant testified that she left the United States in 1924 returning to this country some time about September 20, 1929 at the port of Seattle, Washington. This arrival cannot be verified. She remained in the United States until about April 1930 when she returned to Japan. Thereafter, she last entered the United States on September 8, 1932 as the wife of a treaty merchant under the provisions of Section 3(6) of the Immigration Act of 1924 (Ex. 4). Her testimony indicates that she last departed from the United States on June 20, 1933 (p. 8). She now seeks admission for permanent residence and is in possession of a nonquota immigration visa issued to her as a returning resident

under the provisions of Section 4(b) of the Immigration Act of 1924.

The Board of Special Inquiry's decision to exclude is predicated solely on the ground that the appellant is not entitled to a returning resident status by reason of the fact that at the time of her last entry to the United States on Sepember 20, 1932 she was admitted as the nonimmigrant wife of a treaty trader. There is no intimation in the findings of the Board of Special Inquiry that the appellant ever abandoned her domicile in the United States, and there is ample evidence of record to support the conclusion reached by the Board of Special Inquiry and the American Consular Service that the appellant is returning from a temporary visit abroad (Ex. 5). The issue is therefore narrowed to whether the appellant's entry as a nonimmigrant on September 20, 1932 served to divest her of her status as a lawful resident of the United States. We shall limit this discussion to that question.

The appellant's husband has been a lawful resident of the United States since October 2, 1906. He is the president and principal stockholder of the Fuji Trading Company located in Chicago, Illinois. He has made 24 or more trips to Japan all of his absences being for a period of less than one year. Commencing with his trip in September 1924 he secured a reentry permit each time he departed from the United States. In April 1928, however, he made an application for a reentry permit but departed for Japan before the reentry permit was received by the port. The reentry permit was returned to the Central Office. During the course of a hearing accorded to him under a warrant of arrest he testified that he assumed that the reentry permit would be forwarded to the American Consul at Yokohama, Japan. The Consul, however, advised him that such was not the proper procedure and issued him a nonimmigrant visa as a treaty trader merchant under Section 3(6) of the Immigration Act of 1924 and advised him to adjust his status after his return to the United States. He attempted to adjust his status but his request was denied by the then Board of Review on April 13, 1929. Thereafter, he made several trips to Japan reentering each time as a 3(6) treaty merchant or visitor for business. On February 4, 1948 as a result of deportation proceedings, this Service concluded that the residence in the United States of the appellant's husband had always been that of a per-

manent nature and that his trips to Japan were merely temporary visits. As a result, it was directed that his last entry on November 2, 1941 he regarded as an admission as a returning resident, and that all the intervening entries from September 29, 1928 to October 8, 1940, inclusive, be likewise regarded as admissions as a returning resident within the provisions of Section 13(b) of the Immigration Act of 1924, conditioned upon a waiver of the documentary requirements by the Department of State. It was further directed that the warrant of arrest be cancelled and the proceedings terminated.

The evidence of record in this case indicates that the causes leading up to the appellant's apparent acceptance of the status of the wife of a treaty trader in lieu of that of a returning resident on the occasion of her entries in September 1929 and September 8, 1932, were in substance those which led to her husband's classification as a treaty trader, as previously discussed. She has never voluntarily relinquished her domicile in the United States and, as in the case of her husband, we find the provisions of Section 13(b) of the Immigration Act of 1924 applicable to the 1928 and 1932 entries referred to. They will be considered, nunc pro tunc, as showing her admission for permanent residence as a returning resident. The effect thereof will be to render the present grounds of inadmissibility inapplicable.

Since disposition of this case is in consonance with the arguments raised by Counsel, as well as the relief sought, it is deemed unnecessary to dwell upon them.

Order: It is ordered that the appellant's entries at the port of Seattle, Washington about September 20, 1929 and on September 8, 1932 be regarded, nunc pro tunc, as admissions for permanent residence as a returning resident under the provisions of Section 13(b) of the Immigration Act of May 26, 1934, documentary requirements being waived.

It Is Further Ordered that the appellant's appeal be sustained.

A. C. Devaney,
Assistant Commissioner, Adjudications Division.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of record, filed September 26, 1950, in:

Cause No. 10192

KAKU NAGANO, PLAINTIFF-APPELLANT

vs.

J. HOWARD MCGRATH, ATTORNEY GENERAL, ETC., DEFENDANT-APPELLEE

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this sixth day of June, A. D. 1951.

[SEAL.] (S.) KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the third day of October in the year of our Lord one thousand nine hundred and fifty, and of our Independence the one hundred seventy-fifth:

No. 10192

KAKU NAGANO, PLAINTIFF-APPELLANT

vs.

J. HOWARD MCGRATH, ATTORNEY GENERAL, ETC., DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

And afterward, to-wit, on the twenty-sixth day of February, 1951, there was filed in the office of the Clerk of this Court the opinion of

the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

October Term, 1950, January Session, 1951

No. 10192

KAKU NAGANO, PLAINTIFF-APPELLANT

vs.

J. HOWARD MCGRATH, ATTORNEY GENERAL, ETC., DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

February 26, 1951

Before DUFFY, FINNEGAN and LINDLEY, *Circuit Judges*

LINDLEY, *Circuit Judge:*

The District Court having allowed defendant's motion to dismiss plaintiff's complaint, plaintiff appeals. Consequently, our only question is whether, by the averments of the complaint, a good and sufficient cause of action was presented.

The averments are in substance as follows: Plaintiff, a native of Japan, is a permanent resident of the United States, and has resided within this country for a period in excess of seven consecutive years following 1915, when she first entered, and has never relinquished that residence. She is married to Shinsaku Nagano, likewise a native of Japan, who immigrated to the United States as a permanent resident in the year 1906 and whose permanent residence, both legally and physically, has continued at all times in Chicago, Illinois. Plaintiff has been but temporarily in Japan, without intending at any time to abandon or relinquish her permanent residence in the United States. She is not an enemy or an ally of an enemy or a national of a designated enemy country within the meaning of the Trading with the Enemy Act.

The suit is brought against the Attorney General as successor to the Alien Property Custodian for the purpose of establishing plaintiff's ownership in certain shares of stock of The Fuji Trading Company, which have been taken over by the Custodian on the ground that plaintiff is a national of Japan, a designated enemy country.

The Fuji Trading Company is an Illinois corporation having its principal place of business in Chicago, and is engaged in the manufacture and sale of certain oriental food products. The enterprise was founded in 1910 by plaintiff's husband and has been carried on since that date under his sole management and direction. It is a leading company within the United States in terms of volume and reputation of product as compared with others engaged in the same line of business. The corporation was organized in 1912, and since that time, the husband has been its president and majority stockholder.

Prior to January 3, 1932, the total capital stock of the company consisted of 10,000 shares of common stock, ownership of which was as follows: Shinsaku Nagano, 6210 shares, plaintiff, 3780 shares, and the brother of plaintiff, one Miya, 10 shares. On January 3, 1932, the corporation declared a stock dividend of 5000 shares payable to the holders of record in proportion to their then holdings. Notwithstanding the direction of the resolution that the stock be delivered proportionately to the then existing stockholders, a single certificate for 5000 shares was issued in the name of the wife. However, this certificate was retained in the possession of the husband and never actually or constructively delivered to plaintiff, who had, until approximately the time she instituted this suit, no knowledge of the stock dividend or of the issuance of the certificate in her name; such knowledge as she has in this respect has come to her solely through information given her by her attorney.

The averments as to plaintiff's residence in and absence from the United States are as follows: In January, 1914, plaintiff, then residing in Tokyo, married Shinsaku Nagano, then a permanent resident of the United States. Following the birth of a daughter, Masako, in Japan in November, 1914, plaintiff immigrated to the United States in January, 1915, as a permanent resident, leaving her daughter in the care of plaintiff's mother. In 1916, a son, Shigeo, was born to plaintiff and her husband in Chicago. In 1919, plaintiff, her son, and her husband went to Japan on a voyage, having for its purpose the husband's recuperation from a severe attack of influenza which he had sustained during an epidemic occurring that year. While they were in Japan, another daughter, Takako, was born. After completion of their visit, the father, mother and son returned to Chicago, leaving the two daughters in the care of their grandmother. Plaintiff then continued to reside in Chicago with her husband until 1924.

In 1924, the daughter Takako's illness necessitated a visit to Japan by plaintiff and her husband. On this occasion they decided that plaintiff should remain in Japan as long as necessary to provide a Japanese education for the two daughters and for the American-born son, the latter's oriental education being deemed necessary in

order to prepare him to take his place in his father's importing business. The daughters remained in Japan largely because of lack of marriage prospects except among their own race; they finished their education and reached marriageable ages in 1932 and in 1937. In Japan such marriages are arranged for by the parents and a friend acting as intermediary, who is called a matchmaker. The presence of the parent with the daughter is indispensable. Contrary to the hopes of the father and mother, the anticipated marriages could not be arranged because so many of the young men were away in the army. This was at a time when Japan was engaged in military activities in Manchukuo. Finally, in 1941, Takako's marriage was arranged, but Masako is still unmarried and is past the age ordinarily acceptable for marriage. The United States Immigration Act of 1924 removed any right to bring the daughters to the United States during the years in which plaintiff was obliged to remain in Japan.

During all this period the husband remained physically present in and a permanent resident of the United States at Chicago. Plaintiff has at all times considered her home to be with her husband in Chicago, and has consistently retained her constant intention to return to her husband and her American residence at the earliest date possible. In the meantime, plaintiff's husband has visited her in Japan every year since her departure from the United States in the year 1924, save only for the years 1932 and 1933, during which she was in the United States, and save also for the war years, commencing in 1942. Plaintiff has at all times remained loyal to the United States and has not engaged in trade with Japan or participated in the Japanese war effort with Japan. During the war she was inactive and lived with her unmarried daughter in their cottage in Shizuoka. Her absence, because of these circumstances, she avers was only temporary and involuntary, occasioned by family obligations and not for the purpose of trading with Japan or for the purpose of residing in Japan.

In addition to the averments mentioned, the record contains an order of the Immigration and Naturalization Service of the Department of Justice, August 11, 1950, in which the Assistant Commissioner, Adjudications Division, held that there was ample evidence of record to support the conclusion reached by the Board of Special Inquiry and the American Consular Service that plaintiff was then returning to America from a temporary visit abroad; that she had never voluntarily relinquished her domicile in the United States and that she was entitled to enter this country "as a returning resident."

The District Court held as a matter of law that the facts averred were sufficient to bring her within the definition of an enemy contained in Section 2 of the Trading with the Enemy Act; that her long stay in Japan was such as to make of her a "resident within"

the territory of an enemy nation, regardless of the possibility that her domicile remained at all times in the United States where her husband had his domicile. The court was of the opinion that the alleged family necessity relied on by plaintiff as justification for her long stay in Japan, was not sufficient to exempt her from the correct connotation of the word "enemy." Accordingly, it decided that a valid cause of action was not stated.

The court considered also Section 12 of the War Claims Act of 1948 (Public Law 896, 80th Congress, 2nd Sess.) which amended the Trading with the Enemy Act by adding thereto Section 39, which, defendant claims, prevents recovery by plaintiff because she is a national of Japan. However, it did not consider this section relevant to a case brought under Section 9 (a) of the Act and held that the suit must fall under the provisions of Section 9 (a), because she was an enemy but not because of the provisions of the new Section 39.

Upon appeal, plaintiff urges that the court erred in finding that, under the averments of the complaint, plaintiff is an enemy within the meaning of the Trading with the Enemy Act so that she may not maintain an action under Section 9 (a) of the Trading with the Enemy Act, to recover her property vested by the Alien Property Custodian.

The Government contends that the court rightfully held that plaintiff was barred from bringing her action and renews its contention that, under Section 39, plaintiff is absolutely barred from maintaining any action as a citizen of Japan.

Section 2 of the Trading with the Enemy Act of 1917, as amended (U.S.C.A. Title 50 Appendix) defines "enemy" as: "Any individual * * * of any nationality, resident within the territory * * * of any nation with which the United States is at war * * *." Section 7 (c) provides for the seizure of enemy property belonging to or held for the benefit of an enemy, by the Alien Property Custodian; Section 9 (a) that "Any person not an enemy * * * claiming any interest, * * * in any money or other property which may have been seized by" the Custodian "* * * may file * * * a notice of his claim" and, if this is denied, "institute a suit * * * in the district court * * * to establish the interest, * * * so claimed," and if the claim is substantiated "the court shall order the * * * delivery to said claimant * * * of property so held." In pursuance of these pertinent statutes, plaintiff based her suit on her averments that she was a permanent resident of Chicago and, therefore, though an alien, not an enemy within the definition contained in Section 2; that she had never, since her marriage to an American resident, resided within Japan within the meaning of the Act, and that, therefore, under Section 9 (a) she was entitled to recover her assets taken over by the Custodian.

Whether the District Court rightfully held that she was an alien enemy within the meaning of the Act and, therefore, unable to maintain her suit, must be determined, of course, from the averments of her complaint, admitted by the defendant by his motion to dismiss. Essentially these are that, following her marriage, plaintiff entered the United States by permission of the government as a permanent resident and remained there as such until 1924; that after her visits to Japan in the intervening years, in each instance, she returned and was again admitted as a resident of the United States; that, upon the occasion of her last visit to Japan, she and her husband decided that she should remain in that country for the purpose of educating their daughters and getting them married and educating their son, preparatory to his participation in his father's business of importation of oriental food products; that, under Japan's traditional customs and laws, the marriage of the daughters was a matter of contract, involving the intervention of a "matchmaker" and requiring the presence of a parent; that, in pursuance of her stay, one daughter was married and that she was still living with the other in a cottage when the war with Japan intervened; that, after 1924, it was impossible, under the laws of the United States to obtain entry of the two girls to America; that it was practically impossible to find husbands for them except amongst members of their own race; that her stay in Japan was necessitated and imposed upon her by her family obligations and her parental duties; that at all times she intended to return to her home in Chicago to live there permanently with her husband; that she never abandoned her residence there and had no intention of abandoning the same or of changing it to any other place. Obviously, after the war intervened, it was impossible for her to leave Japan in fulfilment of this intention, and during that period, at least, she was under compulsory contraint in the legal sense of the word. After the war she did return to Chicago as a resident of the United States, being permitted to do so by the Immigration Bureau.

Residence is mostly a matter of intention; from the facts averred, it is clear that plaintiff never intended to change her established Chicago residence. The fact that she went to Japan in an attempt to discharge her parental duties does not negate the fact that her permanent residence was in Chicago and that her stay in Japan was for a limited period of time entailed by her praiseworthy sense of family obligation. Permanent residence does not arise out of a transitory abode or out of a temporary sojourn in a place other than that of residence. We think the averments of fact here such that it can only be said that on the face of the complaint she was at all times a permanent resident of the City of Chicago; that she never abandoned that residence and that, as such a resident of the United States, though an alien and at that time incapable of becoming

naturalized, she was never within the definition of an enemy,—a "resident within" enemy territory. In *McGrath* v. *Zander*, 177 F. 2d 649, the Court of Appeals for the District of Columbia considered a similar situation with this conclusion: "The crucial term 'resident within' has been interpreted in *Josephberg* v. *Markham*, 2 Cir., 1945, 152 F. 2d 644, 648-649; *Vowinckel* v. *First Federal Trust Co.*, *supra*, 10 F. 2d at pages 20, 21; *Stadtmuller* v. *Miller*, *supra*, 11 F. 2d at pages 737-739, 45 A.L.R. 895, and *Sarthou* v. *Clark*, D.C.S.D. Cal. 1948, 78 F. Supp. 139, 142. This last case epitomizes the several rulings in these words: '* * * "resident within the territory" as employed in the Act connotes something different from and more than living within the specified areas. It is rather indicative of a settled and permanent place of abode, volitionally acquired and voluntarily assumed. It is a habitation having domiciliary properties.'" We agree with what was said by that court and with the other decisions cited and conclude that there is nothing in the averments of fact justifying a conclusion of fact that plaintiff was "resident within" Japan.

However, this conclusion is not entirely decisive of the questioned correctness of the judgment of the District Court. Upon the outbreak of the war in 1941, Congress by the First War Powers Act, immediately granted power to the President to vest the property of alien "nationals." However, it did not repeal Sections 2 and 9 (a). As a consequence, the vesting power of the President was extended to the property of nationals but the right to sue for return, Section 9 (a), still ran to nonenemies. This situation was considered by the Supreme Court in *Clark* v. *Uebersee Finanz-Korporation*, A.G., 332 U. S. 480. After commenting that Section 5 (b) of the Act of 1941 granted the President the power to vest any property of any foreign country or national thereof, the court continued: "While the scope of the President's power was broadened, there was no amendment restricting the scope of Section 9 (a). As we have noted, Section 9 (a) granted 'any person not an enemy or ally of enemy,' claiming an interest in property seized, the right to reclaim it. So the provision reads today. * * * The 1941 amendment to Section 5 (b) reflected a complete reversal in that policy. The power of seizure and vesting was extended to all property of any foreign country or national so that no innocent appearing device could become a Trojan horse. Congress did not, however, alter the definitions of enemy or ally of enemy contained in Section 2. They remain the same as they were at the time *Behn, Meyer & Co.* v. *Miller* was decided. * * * Though neither Section 2 nor Section 9 (a) was amended with Section 5 (b) in 1941, one of them must be read differently after than before that event. * * * We believe a more harmonious reading of Section 2, Section 5 (b) and Section 9 (a) is had if the concept of enemy or ally of enemy is given a

scope which helps the amendment of 1941 fulfill its mission and which does not make Section 9 (a) for the first time in its history and contrary to the normal connotation of its terms stand as a barrier to the recovery of property by foreign interests which have no possible connection with the enemy." In short, Section 5 (b) as amended 1941, extended the power of seizure but it did not purport to limit the right of nonenemies to recover under Section 9 (a).

Up to this point we find nothing to impede plaintiff's action, but on July 3, 1948 Congress enacted an amendment which added Section 39, which provides that no property of "any national" of Japan vested in or transferred to an officer or agent of the government pursuant to the provisions of the Act shall be returned to the former owners and that the United States shall not pay compensation for such propery or interest therein. The word "national" had been defined in Executive Order No. 8389, April 10, 1940, 5 F.R. 1400, as amended, as follows: "Any person who has been domiciled in, or a subject citizen or resident of a foreign country at any time on or since the effective date of this Order." This definition was reaffirmed in Executive Order No. 9193, July 6, 1942, 7 F.R. 5205. The First War Powers Act, 1941, Title III, c. 593, 55 Stat. 838, 840, Section 302, provided that all orders promulgated by the President heretofore under the Trading with the Enemy Act, as amended, which would have been authorized if the provisions of the Act and the amendments made by it had been in effect, are "hereby approved, ratified, and confirmed." Therefore, by act of Congress, the word "national" as defined in the Executive orders approved by Congress, includes any person who is a citizen of a foreign country. Thus, if Section 39 is to be taken at its literal face value, it is the law that a citizen of Japan is a national of that nation and that as such plaintiff may not recover her property even though Section 9 (a) giving her right of action has not been expressly repealed. Such, says the government, is the situation here.

The District Court was of the opinion that Section 39 was not intended to repeal Section 9 (a). It concluded that the amendment which added Section 39 and certain other sections was dealing with an entirely different purpose, namely, that of creating a special fund of properties seized by the Custodian to be maintained by the government in a special account and to be expended by it in accord with certain expressed purposes and that it was not the intention of Congress in the enactment of the amendment to deprive nonenemy residents of the United States of their existing right to recover property owned by them and mistakenly seized by the Custodian.

We are not at all concerned with those parts of the legislation of Congress which empower the President through his designated agents, to take certain property. It is beyond question that in time of war the Executive should be and has been authorized to seize

property whenever it is suspected that it may be enemy property, but Congress, though recognizing the necessity of the broadest power in this respect in the Executive, has at all times evinced an intent not to keep from loyal residents, whether alien or citizen, nonenemy property which is rightfully in America, has served no enemy purpose and has threatened to serve none. Such was the administrative policy expressed by the Custodian in his presentation to the Congressional Committee, where he said that on occasion he had found it necessary to vest property which he later discovered he was not entitled to keep. He proceeded thus, he reported, because he considered it necessary to resolve all questions of jeopardy against the United States in favor of the government; if he had a strong suspicion that certain property was enemy property it was his conscientious duty to vest it. He added that subsequent investigations might indicate that he had been mistaken and, in such case, the property should be returned. The Supreme Court approved this practical solution of the problems involved in *Becker* v. *Cummings*, 296 U. S. 74 at 79, where it said: "Section 7 of the Trading with the Enemy Act conferred on the Alien Property Custodian authority summarily to seize property upon his determination that it was enemy owned, and such a seizure was lawful even though the determination were erroneous. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554; *Stoehr* v. *Wallace*, 255 U. S. 239; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51. But in thus authorizing the seizure of property as a war measure Congress did not attempt the confiscation of the property of citizens or alien friends." This same thought is expressed in *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 566, as follows: "There can be no doubt that Congress has power to provide for an immediate seizure in war times of property supposed to belong to an enemy, * * * if adequate provision is made for a return in case of mistake." As said in *Lamar* v. *Browne*, 92 U. S. 187, 196, necessarily, the custodian must act upon appearances. It is his official duty to seize and hold, leaving to the owners to make good their claim as against the capture, in the appropriate tribunal established for that purpose. Thus we have developed a clearly defined policy governing the vesting of enemy property and return of innocent property to a nonenemy owner.

Plaintiff is, under the averments of her complaint, the owner of innocent American property, a friendly alien permanent resident of the United States and as such, entitled to constitutional guarantees. Thus, in *Silesian-American Corp., et al.* v. *Clark, etc.*, 332 U. S. 469, the court said: "The Constitution guarantees to friendly aliens the right to just compensation for the requisitioning of their property by the United States. *Russian Fleet* v. *United States*, 282 U. S. 481, 489. We must assume that the United States will meet its obligations under the Constitution. Consequently, friendly aliens will be

compensated for any property taken * * *." This, of course, refers to the guarantees of the Fifth Amendment, *Russian Fleet* v. *United States*, 282 U. S. 481, 489. We think that the word "friendly" is as applicable to a loyal resident alien, even though of enemy nationality, as it is to one of our own citizens, and this seems to be the conclusion in other cases, such as *Stadtmuller* v. *Miller*, 11 F. 2nd 732 (CA2), 1926; *Vowinckel* v. *First Federal Trust Co.*, 10 F. 2nd 19 (CA9), and *Ex Parte Kumezo Kawato*, 317 U. S. 69, 63 S. Ct. 115. The Supreme Court, itself, said, in *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79: "The seizure and detention which the statute commands and the denial of any remedy except that afforded by Section 9 (a) would be of doubtful constitutionality if the remedy given were inadequate to secure to the non-enemy owner either the return of his property or compensation for it." Thus if Section 39 should be interpreted as the Custodian insists it should be, serious doubt would arise as to its constitutionality, for such a construction would effectuate confiscation of the innocent private property of a friendly resident alien without compensation. Furthermore, the United States has consistently bound itself by treaty to accord to alien residents within its jurisdiction the right of access to American courts to that degree of protection for their person and property required by international law and just compensation and due process of law, if their property should be taken. See 11 Stat. 587, 44 Stat. 2132, 2397, 4441, 45 Stat. 2641, 47 Stat. 2135, 48 Stat. 1507, 49 Stat. 2659, including treaties with various foreign nations.

We need no citation of authority to support the proposition that repeals by implication are never favored and that the clearest case possible must be made before an inference may properly be drawn that a later act by implication repeals an earlier one. By Section 39 and its related sections, Congress was creating a special fund for a special purpose and providing for the disposition of property that it had previously granted the Custodian the right to seize. It was not attempting to pass upon or to deny the rights of a friendly enemy owner or of an alien resident owner to assert his claim but had in mind undoubtedly, from the context of the entire act, the creation of a special account of enemy property seized. As Mr. Justice Douglas said in *Clark* v. *Uebersee, etc., supra*, Section 9 (a) should be read harmoniously with subsequent legislation. In *Uebersee Finanz Korporation* v. *Markham*, 158 F. 2nd 313 (CA-DC), affirmed 332 U. S. 480, the Court of Appeals after concluding that any action provided by the Tucker Act, 28 U.S.C. 250, was forbidden by Section 7 (c), 50 U.S.C. App., held that to read out of the statutes the remedy created by Section 9 (a) was not justified. "In any event," said the court, "to sustain the Custodian's position not only would require a major job of statutory reconstruction, but would also—as to the property of friendly aliens—raise

grave doubts as to the constitutionality of the law. And this, of course, it is not permissible to do." Consequently it followed the language of the Supreme Court in *Markham* v. *Cabell*, 326 U. S. 404 to the effect that by amending Section 5 (a), Congress did not intend to delete Section 9 (a), saying: "the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole."

In this connection it is well to bear in mind that in at least two instances, Congress refused to enact legislation expressly amending or repealing Section 9 (a). 14 H. R. 4840, 78th Cong., 2nd Sess. (1944) and H. R. 5089, 79th Cong., 2nd Sess. (1946). H. R. 4840 provided for a suit under Section 9 (a) to establish that the claimant was not a foreign country or national thereof as defined in Section 5 (b). If the claimant failed to prove these facts he would have been entitled to sue in the Court of Claims. The bill died in committee. Hearings Before Subcommittee No. 1 of the Committee on the Judiciary on H. R. 4840, 78th Cong., 2nd Sess. (1944). In H. R. 5089, it was proposed by Section 33 (a) that "a foreign country or national thereof may not institute, prosecute, or further maintain a suit pursuant to Section 9 (a) hereof in respect to any property or interest vested in or transferred to the Alien Property Custodian * * * or the net proceeds thereof," and by Section 33 (b) that "notwithstanding the provisions of Section 7 (c), such persons shall have the right to bring suit in the Court of Claims." But the House Judiciary Committee did not approve the bill. However, it was reintroduced as H. R. 6890, including again Sec. 33, and passed by the House with amendments with which we are not now concerned. However, the Senate Judiciary deleted it. S. 2378, 79th Cong., 2nd Sess. (1946). The Senate Report explained the omission as designed to eliminate the proposal to cut off the right of a friendly foreign national to sue for and obtain return of his property under Section 9 (a), thus retaining in full the "rights under Section 9 (a) which friendly foreign nationals together with United States citizens, have had for more than twenty-five years under the Act." Sen. Rep. No. 1839, 79th Cong., 2nd Sess. (1946). The bill as amended was passed by both Houses with some members protesting the deletion of Section 33, 92 Cong. Rec. 10628 (1946). See letter of Secretary Byrnes to Chairman Sumners of the House Judiciary Committee in connection with the hearings on H. R. 5089. Hearings Before Subcommittee No. 1 of the Committee on the Judiciary on H. R. 5089, 79th Cong., 2nd Sess. (1946) and Hearings Before Subcommittee No. 1 on the Judiciary on S. 2378, 79th Cong., 2nd Sess. (1946). Surely, after two determinations not to modify or repeal Section 9 (a) by express words, the Congress did not intend to do by implication what it had refused to do by

express repeal. In this connection, it is pertinent also to observe that Section 33 was amended July 1, 1948, to fix time limits within which claims under Sections 9 and 32 might be prosecuted. Section 39 was amended July 3, 1948, with the result, as the government insists, of repealing Section 9. It seems inconceivable that Congress would, on July 1, expressly provide an extension of time within which to file suits under Section 9 and two days later, forbid such suits entirely.

We think the Congressional intent was, as stated by Judge Campbell in the District Court, to cause all forfeitable enemy property to be placed in a special fund for a special purpose and to keep it there irrecoverably for that special purpose. We think the legislation such and the Congressional history such that it is evident that Congress was not proposing to deprive friendly alien residents of all opportunity to recover untainted American property,—a right recognized for some twenty-five years by express legislation. To impute such an intent to the Congress would result in a conclusion that it intended to deprive resident owners of innocent private property, untainted by enmity, without due process of law.

Our conclusion might well rest upon another basis. Thus, though literally speaking, plaintiff is a citizen of Japan, she is not a citizen within the meaning of the word and its connotation recognized by judicial decisions. We ordinarily think of a citizen as one who owes allegiance to a state and has a reciprocal right to protection by it. It is obvious that plaintiff, a loyal American resident, unable to secure citizenship in this country, on the averments of her complaint, owed no allegiance to Japan and had no reciprocal rights to protection by it. Again, our concept of a citizen is one who has the right to exercise all the political and civil privileges extended by his government, yet, under the averments of this complaint, plaintiff had no right to exercise any of the political or civil privileges of Japan. Citizenship conveys the idea of membership in a nation, yet under the averments, we think it can not be said that plaintiff is, in any true sense, a member of the nation of Japan. Though ineligible to citizenship until recently, she was and is a permanent resident, owning untainted American property. Her position, we believe, is not within the conception of citizenship of a foreign nation which Congress had in mind in defining a national.

We conclude that the judgment should be reversed and the cause remanded with directions to vacate the order dismissing the complaint and permit the suit to proceed.

Plaintiff insists that in case of reversal this court should enter judgment in favor of plaintiff. To do so would be beyond the limitations of our legitimate functions, for defendant has a right to controvert the averments of the complaint and to have a trial

upon the merits. We decide merely that plaintiff has stated a good cause of action and that no act of Congress has taken it away.

The judgment is reversed and remanded with directions as aforesaid.

A TRUE COPY:

TESTE:

_____,

Clerk of the United States Court of Appeals for the Seventh Circuit.

And on the same day, to-wit, on the twenty-sixth day of February, 1951, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Monday, February 26, 1951.

Before: Hon. F. Ryan Duffy, *Circuit Judge*; Hon. Philip J. Finnegan, *Circuit Judge;* Hon. Walter C. Lindley, *Circuit Judge.*

No. 10192

KAKU NAGANO, PLAINTIFF-APPELLANT

vs.

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed and that this cause be, and the same is hereby, remanded to the said District Court with directions to proceed in accordance with the opinion of this Court filed this day.

And afterward, to-wit, on the twelfth day of March, 1951, there was filed in the office of the Clerk of this Court a petition for rehearing, which said petition for rehearing is not copied herein.

And afterward, to-wit, on the twenty-second day of March, 1951, there was filed in the office of the Clerk of this Court an answer to the petition for rehearing, which said answer to the petition for rehearing is not copied herein.

And afterward, to-wit, on the fourth day of April, 1951, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, April 4, 1951.

Before: Hon. F. Ryan Duffy, *Circuit Judge*; Hon. Philip J. Finnegan, *Circuit Judge;* Hon. Walter C. Lindley, *Circuit Judge.*

No. 10192

KAKU NAGANO, PLAINTIFF-APPELLANT

vs.

J. HOWARD MCGRATH, ATTORNEY GENERAL, ETC., DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the Petition for a Rehearing of this cause be, and the same is hereby, denied.

And afterward, to-wit, on the ninth day of April, 1951, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

April 9, 1951.

Before: Hon. Walter C. Lindley, *Circuit Judge*.

No. 10005

SHINSAKU NAGANO, PLAINTIFF- APPELLANT

vs.

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, DEFENDANT-APPELLEE

No. 10192

KAKU NAGANO, PLAINTIFF-APPELLANT

vs.

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, DEFENDANT-APPELLEE

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

On motions of counsel for the Defendant-Appellee, it is ordered that the issuance of the mandates of this Court in these appeals be, and the same is hereby, stayed to and including May 9, 1951, pending application to the Supreme Court of the United States for writs of certiorari.

And afterward, to-wit, on the fourteenth day of May, 1951, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

May 14, 1951.

Before: Hon. F. Ryan Duffy, *Circuit Judge*; Hon. Philip J. Finnegan, *Circuit Judge;* Hon. Walter C. Lindley, *Circuit Judge.*

Nos. 10005 and 10192

SHINSAKU NAGANO AND KAKU NAGANO, PLAINTIFFS-APPELLANTS

vs.

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, DEFENDANT-APPELLEE

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the motions of counsel for the defendant-appellee for a further extension of the stay of mandates, it is ordered that the issuance of the mandates of this Court in these appeals be, and the same is hereby, further stayed until June 9, 1951.

And afterward, to-wit, on the eleventh day of June, 1951, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages contain a true copy of the opinion, judgment, order denying petition for rehearing, and orders staying the issuance of the mandate, entered by this Court, in: Cause No. 10192, Kaku Nagano, Plaintiff-Appellant, vs. J. Howard McGrath, Attorney General, etc., Defendant-Appellee, as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this sixth day of June A.D. 1951.

[SEAL.] (S.) KENNETH J. CARRICK,
Clerk of the United States Court of Appeals
for the Seventh Circuit.

☆ U. S. GOVERNMENT PRINTING OFFICE : 1951 954331 010

Supreme Court of the United States

No. 169, October Term, 1951

J. Howard McGrath, Attorney General, as Successor to the Alien Property Custodian, petitioner

vs.

Kaku Nagano

Order allowing certiorari

Filed October 8, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Clark took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1951

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 169

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

KAKU NAGANO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on February 26, 1951.

OPINIONS BELOW

The opinion of the District Court (R. 33-37) is reported in 88 F. Supp. 897. The opinion of the

Court of Appeals (R. 54-65) is reported in 187 F. 2d 759.

JURISDICTION

The judgment of the Court of Appeals was entered on February 26, 1951 (R. 65). A timely petition for rehearing was denied on April 4, 1951 (R. 66). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, notwithstanding the express provision of Section 39 of the Trading with the Enemy Act that no return shall be made of property of any national of Germany or Japan vested after December 17, 1941, such property may be returned, in a suit brought under Section 9(a) of the Act, to a Japanese national found not to be "resident within" Japan and not an "enemy" as defined in Section 2(a) of the Act.

2. If question 1 is answered in the affirmative, whether the allegations of the complaint bearing on respondent's residence are sufficient to establish that, despite her continuous residence within Japan from 1924 to 1950, she was not "resident within" enemy territory upon the outbreak of war.

STATUTES INVOLVED

The relevant provisions of the Trading with the Enemy Act, as amended, and relevant Executive Orders, are set forth in Appendix A, *infra*, pp. 15-23.

STATEMENT

By Vesting Order No. 813, dated February 2, 1943, the Alien Property Custodian[1] vested in himself 8,780 shares of the common stock of the Fuji Trading Company, an Illinois corporation, as the property of the respondent Kaku Nagano, upon a finding that she was a national of Japan, a designated enemy country (R. 10-11).

On December 19, 1947, respondent filed in the District Court for the Northern District of Illinois (Eastern Division) a complaint under Section 9(a) of the Trading with the Enemy Act. She alleged, generally, that she was a permanent resident of the United States temporarily in Japan without having abandoned or having intended to abandon her domicile in the United States and that she was not an "enemy" or a "national of a designated enemy country" under the Trading with the Enemy Act (R. 2, 3). The following specific facts were alleged in the complaint: Respondent was born in Japan in 1892 and is a Japanese citizen (R. 2, 16). In 1914 she was married in Japan to Shinsaku Nagano, a native-born citizen of Japan who had been admitted to the United

[1] By Executive Order No. 9788, October 14, 1946, 11 F.R. 11981, the authority, rights, privileges and powers of the Alien Property Custodian were transferred to the Attorney General. The term "Custodian" will be used to indicate either official, as the context may require. The complaint was originally brought against Tom C. Clark, Attorney General. J. Howard McGrath, Attorney General, was substituted as defendant on December 22, 1949 (R. 33).

States for permanent residence in 1906 (R. 2, 5). A daughter was born to them in Japan in 1914 (R. 5). The following year, respondent was admitted to the United States for permanent residence (R. 5, 6), but the daughter was left in Japan in the care of respondent's mother (R. 6). In 1916, a son was born in Chicago (R. 6). In 1919 the Naganos and their son went to Japan and, while there, a second daughter was born (R. 6). Both daughters remained in Japan with respondent's mother while the parents and son returned to this country (R. 6). In 1924 the respondent, with her husband and son, again visited Japan (R. 6). This time, however, she remained in Japan, together with the daughters and the son, when the father returned to the United States (R. 6). Aside from a nine months' visit to the United States beginning in September 1932 (R. 7, 30-31, 49), respondent was in Japan with her children from 1923 or 1924 until 1950, when she again entered the United States (R. 49). Her husband visited her in Japan for several months each year after 1924, except for the period 1932-1933 and during the war (R. 7). Respondent's purposes in going to Japan in 1924 and remaining there were to provide a Japanese education for the son, then aged eight, and to make arrangements in Japan for the marriages of the daughters, then aged ten and four (R. 6).

The petitioner moved to dismiss the complaint

for failure to state a claim. (R. 28). The District Court granted the motion and dismissed the action. The court held that, even though respondent's legal domicile may have remained in the United States she was a person "resident within" Japan during the war under Section 2(a) of the Trading with the Enemy Act, and therefore an enemy ineligible to bring suit under Section 9(a) of the Act. Rejecting "the alleged family necessity relied on by [respondent] as an explanation for her long stay in Japan," the court held that "the facts alleged by [respondent] show that her residence in Japan was deliberate, whatever its motivation." (R. 35). The District Court relied solely on Section 2(a), and rejected the Government's alternative contention that Section 39, prohibiting returns to nationals of Japan, was a bar to recovery. (R. 33-38)

The Court of Appeals for the Seventh Circuit reversed, holding (1) that respondent was not "resident within" Japan inasmuch as, on the facts alleged, she had never intended to abandon her "permanent residence" in the United States; and (2) that Section 39 did not bar respondent's recovery.[2] (R. 54-65)

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[2] Shinsaku Nagano, the husband of respondent and a citizen of Japan, brought a companion suit under § 9(a) to recover, as his own property, 3,105 of the 8,780 vested shares. The court below, reversing the District Court, held the husband entitled to the 3,105 shares and directed the entry of judgment for him for the recovery of those shares. *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753 (C.A. 7). The court did not pass on

REASONS FOR GRANTING THE WRIT

1. The decision below, in both its aspects, raises questions of substantial importance involving the construction and administration of the Trading with the Enemy Act.

(a) The ruling that Section 39, which in express terms bars return to German or Japanese nationals of property vested after December 17, 1941, does not apply to any such national who is a "friendly resident" of the United States is in direct conflict with the recent decision of the Court of Appeals for the District of Columbia Circuit in *Guessefeldt* v. *McGrath*, rendered May 3, 1951, No. 10600 (not yet reported). The full text of the *Guessefeldt* opinion is set forth in Appendix B, *infra*, pp. 24-30. The existence of a square conflict is explicitly recognized in the latter opinion, *infra*, p. 26.

(b) Similarly, the holding below that the allegations of the complaint, if true, are sufficient to establish that respondent was not "resident within" Japan during the war and hence not an enemy as defined in Section 2(a) is in conflict in principle with numerous decisions (cited, *infra*, p. 13, n. 7) holding persons "resident within" enemy territory without regard to their domicile. The holding

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the applicability of Section 39 as a bar to the husband's recovery. No review of that decision is being sought. The husband, as a citizen of Japan who was not present there during the war but was in the United States, is presumably eligible for an administrative return of his property under Section 32(a)(2)(D) of the Act (60 Stat. 50, 50 U.S.C. App. 32).

below also disregards the legislative history which clearly shows that "residence" was not intended by Congress to be synonymous with "domicile" and that while "resident within" as used in Section 2 may not have been intended to embrace a mere transient or one involuntarily detained, it was intended to include an individual who voluntarily chose to remain in an enemy country for more than transitory purposes, regardless of his intention to retain a legal domicile elsewhere. The decision below and other lower court decisions dealing with the "residence" question have cast a cloud of confusion upon the meaning of this provision of the Act. A large number of cases is now pending which involve construction of this term, and it is highly desirable that this Court should now resolve these uncertainties which handicap effective enforcement of the Act and unduly prolong litigation arising under it.

2. The decision of the court below is believed to be erroneous, both with respect to Section 39 and Section 2(a).

(a) *Section 39.*—That section (Appendix A, *infra*, p. 21) was added to the Trading with the Enemy Act by Section 12 of the War Claims Act of 1948, 62 Stat. 1246, 50 U.S.C. App. 12. It provides that no property of Germany or Japan or "any national of either such country" vested after December 17, 1941 (the effective date of the World War II vesting powers) "shall be returned to

former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein." The War Claims Act also set up a commission to pass on claims of American internees and prisoners-of-war who had been mistreated by the enemy and to pay those claims out of the net proceeds derived from German and Japanese vested property "covered into the Treasury pursuant to the provisions of Section 39 of the Trading with the Enemy Act." Sec. 13(a), War Claims Act of 1948, 62 Stat. 1247, 50 U.S.C. App. 2012.

Although the court below recognized that Section 39, literally read, would, because of respondent's Japanese citizenship, bar a suit for the return of her vested property, it refused so to hold. Reasoning that the history of the Act prior to its amendment in 1948 shows a Congressional policy not to bar such recovery by a "friendly resident" and that the 1948 amendment prohibiting returns to Japanese and German nationals does not in terms amend Section 9(a), the court concluded that Congress intended, not to bar returns previously authorized under Section 9(a), but merely to designate Japanese and German vested property not otherwise recoverable as the source of the funds for the payment of war claims.

In the *Guessefeldt* case, however, the Court of Appeals for the District of Columbia Circuit construed Section 39, in accordance with its express

terms, so as to bar returns to *all* Japanese and German nationals, including even those who might previously have obtained returns under Section 9(a). The court noted that the amendment to Section 5(b) of the Act, which went into effect on December 17, 1941 (55 Stat. 838, 50 U.S.C. App. 5(b)), authorizes the vesting of property of *any* foreign national. Since Section 39 in specific terms prohibits a return of property vested after December 17, 1941, to nationals of Germany or Japan,[3] the court held that although nationals of countries other than Germany or Japan may still establish their claims under Section 9(a), nationals of the latter countries are precluded by Section 39 from doing so. It found support in the legislative history for its conclusion that Congress recognized that Section 39 applied to "nationals" of Germany or Japan, wherever resident and whether "friendly" or not. Hearings, Senate Subcommittee of Committee on the Judiciary, on H.R. 4044, 80th Cong., 2d Sess., pp. 197-198, 233, 234, 235, 255. See also *Schill* v. *McGrath*, 89 F.

[3] The word "national" as used in the Trading with the Enemy Act has been defined to include a citizen. Executive Order No. 8389, § 5E(i), 5 F.R. 1400. This definition has been twice ratified by Congress. § 2, Joint Resolution of May 7, 1940, 54 Stat. 179; § 302, First War Powers Act, 1941, 55 Stat. 838, 840.

Contrary to the intimation of the Court of Appeals in the Seventh Circuit, respondent is a "citizen" of Japan in the only sense in which the word has any meaning. If "national" means anything, it means "citizen." Wharton, *Law Lexicon* (14th Ed., 1938); Moore, *Digest of International Law*, Vol. III, p. 273 (1906); Halleck, *International Law* (3d Ed., 1893), Vol. I, p. 401; Nationality Act of 1940, 54 Stat. 1137, 8 U.S.C. § 501.

Supp. 339 (S.D.N.Y.) [4] The court also noted that not all nationals of Germany and Japan are denied a remedy under the Act. Section 32 (60 Stat. 50, as amended, 50 U.S.C. App. 32), which had been adopted in 1946 to relieve the stringency of the Act, authorizes discretionary administrative returns to certain specially designated classes of persons. Included in these classes are enemy nationals, even though residing within an enemy country, who were in fact denied the prerogatives of citizenship as a result of discrimination practiced by the enemy government. Section 32(a)(2)(C) and (D).[5] Section 32 is expressly excepted from the operation of Section 39.

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[4] The constitutionality of Section 39 was not argued before the Court of Appeals in *Guessefeldt;* hence the opinion of that court contains no reference thereto. The court in the instant case, however, indicated that the application of Section 39 to bar a return because of respondent's enemy citizenship would raise a serious constitutional question. We think it clear that the application of the vesting power to the property of an enemy national offends no constitutional limitation. *Silesian-American Corporation* v. *Clark*, 332 U.S. 469, 475; *United States* v. *Chemical Foundation*, 272 U.S. 1, 11; *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 120; *Miller* v. *United States*, 11 Wall. 268, 305; *Klein* v. *Palmer*, 18 F. 2d 932, 934 (C.A. 2).

[5] Also included in the classes of persons who are ineligible to bring suit under Section 9(a) but who may qualify for return under Section 32 are (1) American citizens even though voluntarily residing within an enemy country, Section 32(a)(2)(C); and (2) nationals of occupied countries who became technical enemies by virtue of their residence within enemy territory, Section 32(a)(2)(C).

Enemy citizens, who were not present within enemy territory at any time between December 7, 1941 and March 8, 1946, the date of the enactment of Section 32, are also eligible to seek an administrative return (32(a)(2)(D)), e.g., respondent's husband, see note 2, pp. 5-6, *supra*.

(b) *"Resident Within"*—Respondent, a Japanese citizen by birth, was living in Japan on December 7, 1941, and in 1943 when her property was vested. On the day of Pearl Harbor, she had been living there uninterruptedly for almost twenty years, except for a nine-months' visit to the United States in the early 1930's. She was in Japan to educate her children and to arrange for the marriages of her daughters—a stay hardly involuntary and clearly not transitory. Yet the Court of Appeals, equating "resident within" to "domiciled", held that respondent was not "resident within" Japan since, on her allegations in the complaint, during the period 1915-1924 she had established a "permanent residence" in the United States, to which she intended to return.

The language of the Act does not warrant this result. As a matter of statutory usage it is well settled that "resident" may or may not mean "domiciled." See *McGrath* v. *Kristensen*, 340 U.S. 162, 175; Kennan, *Residence and Domicile* (1934), pp. 22-27. The legislative history of Section 2 is clear that "resident within" was not intended to mean "domiciled." When the original Act was debated in the 65th Congress, the specific question was asked whether "resident" meant "having acquired what we know as a legal residence, a domicile." Mr. Montague, Chairman of the Committee which reported the bill, replied:

> No, it does not. The word "residence" is much broader than the word "domicile". Domi-

> cile would give you perhaps the idea of permanency, of a legal habitat, but the word "resident" means a sojourner staying or residing in. It embraces domicile and is broader than domicile. [55 Cong. Rec. 4922.]

See also 55 Cong. Rec. 4850, 4926.

The holding of the court below, moreover, disregards the basic scheme of the Act. As it was drawn in 1917 and as it stands now, the Act authorizes the seizure of property belonging to an "enemy" (Section 7(c)), as that term is defined in Section 2, and provides a judicial remedy to a former owner who can establish that he is not a Section 2 "enemy" (Section 9(a)). The definition of "enemy" in Section 2 is framed on the hypothesis that the residence of the owner behind the enemy's lines puts his American property within the power of the enemy government. Accordingly, the owner, regardless of citizenship, is classed as an "enemy". *Kahn* v. *Garvan*, 263 Fed. 909, 915 (S.D.N.Y.). To weaken the enemy and to strengthen the United States, his property is made subject to seizure, and he may not recover it under Section 9(a). See *United States* v. *Chemical Foundation*, 272 U.S. 1; *Josephberg* v. *Markham*, 152 F. 2d 644, 648 (C.A. 2). Under this statutory scheme, what matters is whether the individual has placed himself within the enemy's territory

and within his power; his intention to retain a domicile in the United States is immaterial.[6]

To construe "resident within" to mean "domiciled" is to adopt almost the narrowest possible interpretation, and to restrict correspondingly the application of the Act, contrary to the settled rule of construction that the provisions of the Act for the seizure and disposition of enemy property should be liberally construed to effectuate the purposes they were enacted to subserve. *United States* v. *Chemical Foundation*, 272 U.S. 1, 10; *Propper* v. *Clark*, 337 U.S. 472, 481.[7]

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[6] It may be that a construction of "resident within" which embraces a mere transient or one involuntarily detained in enemy territory furthers the objectives of the Act no less than a construction which includes one remaining for more than transitory purposes. Congress, however, apparently meant to compromise between the exigencies and the hardships of war. The legislative history suggests that those under constraint were not intended to be included. See 55 Cong. Rec. 4922. But it does not follow that persons domiciled elsewhere were not to be included. The legislative history, discussed *supra*, shows quite the contrary.

[7] The lower courts have reached a diversity of results as to the construction of "resident within." In *Vowinckel* v. *First Federal Trust Co.*, 10 F. 2d 19 (C.A. 9), the court held that the term meant "domiciled" but it also held Vowinckel, as a Red Cross Surgeon, exempt from the Act in any event. In a number of cases, the courts have held persons "resident within" enemy territory without reference to the issue of "domicile." See, *United States* v. *Krepper*, 159 F. 2d 958, 966 (C.A. 3), certiorari denied, 330 U.S. 824; *Salvoni* v. *Pilson*, 181 F. 2d 615 (C.A.D.C.); *Faber* v. *United States*, 10 F. Supp. 602, 605 (Ct. Cl.), certiorari denied, 296 U.S. 596; *Miller* v. *Paul*, 237 Ill. App. 166, 168 173; *Wirtele* v. *Grand Lodge*, 111 Neb. 302, 304-305, 196 N.W. 510, 511; *Noble* v. *Great American Insurance Co.*, 250 App. Div. 773, 777, 194 N.Y. Supp. 60, 64, affirmed, 235 N.Y. 589, 139 N.E. 746; *Gregg's Estate*, 266 Pa. 189, 192-193, 109 Atl. 777, 778, certiorari denied, 252 U.S. 588. In others, the courts have held that persons constrained to remain within enemy territory were not enemies. See, *McGrath* v.

The court below also appears to misconceive the effect of the decision in *Clark* v. *Uebersee Finanz Korp.*, 332 U.S. 480. It was there held that the effect of the amendment by the First War Powers Act of 1941 to Section 5(b) of the Trading with the Enemy Act (55 Stat. 838, 50 U.S.C. App. 5(b)) was to broaden (not to narrow) the Section 2 definition of "enemy" and so to widen the class of persons disqualified from suit under Section 9(a). Certainly, if the Section 2 definition of "enemy" based on residence is to be broadened in any respect, it cannot be limited to domicile, which is undoubtedly the most restrictive definition of residence.

3. As of March 31, 1951, there were 68 actions pending under Section 9(a) of the Trading with the Enemy Act in which individuals were plaintiffs. Of these 68 cases, 52 involved the construction of the phrase "resident within", 47 involved the application of Section 39 of the Act, and 39 involved both the construction of "resident within" and Section 39.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

JULY, 1951.

Zander, 177 F. 2d 649 (C.A.D.C.); *Stadtmuller* v. *Miller*, 11 F. 2d 732 (C.A. 2); *Sarthou* v. *Clark*, 78 F. Supp. 139 (S.D. Calif.); cf. *Josephberg* v. *Markham*, 152 F. 2d 644 (C.A. 2).

APPENDIX A

1. Trading With the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. 1 et seq:

* * * * *

SEC. 2. That the word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require,

may, by proclamation, include within the term "enemy."

* * * * *

Sec. 5, as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App. 616:

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any

foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property, shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

SEC. 7. * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian,

or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or in-

terest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until

final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

SEC. 32. (a) The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

(2) that such owner, and legal representative or successor in interest, if any, are not—

* * * * *

(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section [March 8, 1946] was present (other than in the service of the United States) in the territory of such nation or in any territory

occupied by the military or naval forces thereof or engaged in any business in any such territory * * *

* * * * *

SEC. 39. No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act or of the Philippine Property Act of 1946.

* * * * *

2. War Claims Act of 1948, c. 826, 62 Stat. 1246:

* * * * *

SEC. 12. The Trading With the Enemy Act of October 6, 1917, as amended, is hereby amended by adding at the end thereof the following new section:

"SEC. 39. No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any

officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act or of the Philippine Property Act of 1946."

SEC. 13. (a) There is hereby created on the books of the Treasury of the United States a trust fund to be known as the War Claims Fund. The War Claims Fund shall consist of all sums covered into the Treasury pursuant to the provisions of section 39 of the Trading With the Enemy Act of October 6, 1917, as amended. The moneys in such fund shall be available for expenditure only as provided in this Act or as may be provided hereafter by the Congress.

* * * * *

3. Executive Order No. 8389, 5 F. R. 1400, 6 F. R. 2897, 2898:

* * * * *

SEC. 5.

* * * * *

E. The term "national" shall include,

(i) Any person who has been domiciled in,

or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order * * *

* * * * *

4. Joint Resolution of May 7, 1940, 54 Stat. 179:

* * * * *

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

* * * * *

5. First War Powers Act, 1941, Title III, c. 593, 55 Stat. 838, 840:

* * * * *

SEC. 302. All acts, actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made, or issued by, or pursuant to the direction of, the President or the Secretary of the Treasury under the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, which would have been authorized if the provisions of this Act and the amendments made by it had been in effect, are hereby approved, ratified, and confirmed.

* * * * *

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10600

RICHARD GUESSEFELDT, APPELLANT

v.

J. HOWARD MCGRATH, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, AND GEORGIA NEESE CLARK, AS TREASURER OF THE UNITED STATES, APPELLEES

Appeal from Judgment of The United States District Court for the District of Columbia

Decided May 3, 1951

Before EDGERTON, CLARK, AND PROCTOR, Circuit Judges.

CLARK, *Circuit Judge:* This is an appeal from the United States District Court for the District of Columbia. Appellant brought his suit in that court for the return of property vested pursuant to Section 5 (b) of the *Trading With the Enemy Act*, 55 Stat. 839, 50 U. S. C. A. App. § 5 (b).

The complaint states, *inter alia*, that the appellant was born in Germany in 1870 and that he is still a citizen of that country. The appellant has been a resident of Hawaii since 1896, but he is not a citizen of the United States. The complaint alleges that he was present in Germany between April 1938 and July 1949, but that his stay in Germany after the outbreak of World War II was in-

voluntary. It is further alleged that the appellant committed no act hostile to the interests of the United States during the enforced stay.

The Attorney General moved to dismiss the complaint on the ground that the appellant's German citizenship, without more, disqualifies him from recovery under the Act. The District Court so held, and the basis of that decision was Section 39 of the Act, 62 Stat. 1246, 50 U. S. C. Supp., App. § 39, which declares in part:

> "No property or interest therein of Germany, Japan, *or any national of either such country* vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein." (Emphasis supplied.)

The appellant brings this suit under Section 9(a) of the Act, 42 Stat. 1511, 50 U. S. C. App. § 9(a). The lower court decided that the appellant would be entitled to the return of this property under that section of the *Trading With the Enemy Act*, *supra*, except for Section 39 of the Act. *McGrath* v. *Zander*, 85 U. S. App. D. C. 334, 177 F. (2d) 649 (1949) which affirmed the rule in *Stadtmuller* v. *Miller*, 11 F. (2d) 732 (C. C. A. 2, 1926).

The issue before us then is simply this, has Section 39 of the Act, which prohibits return of World War II vested property to a national of Germany, prevented recovery of such property by a German

citizen. We must conclude that the present law precludes a recovery. Although we can sympathize with the situation in which the appellant finds himself, the statute is quite specific. Concededly the appellant is and always has been a German citizen, and a citizen is necessarily a national of the country of which he is a citizen (here Germany). See *Miyuki Okihara* v. *Clark*, 71 F. Supp. 319 (D. C. Hawaii 1947), and Executive Order 8389, Section 5 E (i), 5 Fed. Reg. 1400 (1940), as amended by Executive Order 8785, 6 Fed. Reg. 2897 (1941). Executive Order No. 9193, Section 10(a) 7 Fed. Reg. 5205 (1942) incorporates the definition of the term "national" as used in Executive Order 8389, *supra*. Consequently, Section 39 operates as a complete bar to the appellant's suit.

The appellant has called to the attention of this Court the opinion by Judge Lindley of the Seventh Circuit in *Nagano* v. *McGrath*, U. S. Court of Appeals for the Seventh Circuit, February 26, 1951.

The facts, we must conclude, are almost identical, but we regret that we cannot reach the same ultimate conclusion. The Court of Appeals for the Seventh Circuit has nonetheless, to a large extent, anticipated our decision. There, our brethren, speaking through Judge Lindley, said:

> "Therefore, by Act of Congress, the word 'national' as defined in the Executive Orders approved by Congress, includes any person who is a citizen of a foreign country. Thus, if Section 39 is to be taken at its literal face value, it is the law that a citizen of Japan is a national of that nation and that such plaintiff may not recover her property even though

Section 9(a) giving her right of action has not been expressly repealed."

The Seventh Circuit did not believe that this result was anticipated by the nation's Legislature when it determined "Congress * * * has at all times evinced an intent not to keep from loyal residents, whether alien or citizen, non-enemy property which is rightfully in America, has served no enemy purpose and has threatened to serve none." With this proposition we can only agree in part, as the remainder of this decision will disclose.

To a large extent in the *Nagano Case, supra,* the Seventh Circuit based its opinion on the proposition that Congress did not intend to repeal Section 9(a) which provides for the return of the property heretofore vested. We quite agree. If Congress had intended to completely repeal Section 9(a) it would have so declared. So far, however, as Section 39 is in irreconcilable conflict with Section 9(a), it must be deemed to have superseded Section 9(a). *Henderson* v. *Washington-Marlboro and Annapolis Motor Lines,* 77 U. S. App. D. C. 26, 132 F. (2d) 729 (1942), Cert. den., *Washington-Marlboro and Annapolis Motor Lines* v. *Henderson,* 63 S. Ct. 853, 318 U. S. 779 (1943).

Under Section 5 (b) property of "any foreign country or national thereof" can be vested. Section 9(a) provides for the return of property to "any person not an enemy or ally of [an] enemy." Enemy as defined in Section 2(a) 40 Stat. 411, 50 U. S. C. App. 62, is "Any individual * * * resident within the territory * * * of any nation with which the United States is at war * * *."

Section 39 does not speak in terms of enemy or an ally of an enemy, but on the contrary it returns to the standard of "nationality." That section declares that no return shall be made to "Germany, Japan, or any national of either such country," if it has been vested. It should be quite apparent that Section 5(b) permits the property of all nationals of foreign countries to be vested, but Section 39 only prohibits return to nationals of Germany or Japan. There is then a group of nationals of foreign countries other than Germany and Japan who may still prove their claims under Section 9(a) if they were not enemies or allies of enemies under Section 2(a). Understandably Congress did not intend to repeal Section 9(a) in its entirety, but a very large restriction is imposed on that provision by Section 39.

Section 39 was enacted as part of the *War Claims Act* of 1948, 62 Stat. 1246, 50 U. S. C. Supp., App. § 39; it is a statute which provides compensation to certain classes of United States nationals who suffered at the hands of the Germans or the Japanese during World War II. Among the principal beneficiaries of the law are American internees and prisoners of war who were the victims of maltreatment while held by the enemy. In Section 13(a) of the *War Claims Act of 1948*, 62 Stat. 1247, 50 U. S. C. A. App. § 2012, it is provided that the source of funds for the payment of these claims shall be the net proceeds derived from German and Japanese vested property withheld under Section 39 of the *Trading With the Enemy Act*. In short, the Congress believed that all enemy assets should be assembled for the purpose of gratifying

the claims of American nationals which arose out of enemy actions. By this provision Congress intended to institute a policy of non-return and non-compensation. H. R. 976, 80th Cong. 1st Sess., pp. 2-3 (1947).

In line with the policy of non-return and non-compensation Congress was aware that the term "national" as used in Section 39 would take in nationals wherever resident and regardless of their personal disposition toward the enemy. See Hearings before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 80th Cong. 2d Sess., on H. R. 4044, p. 233. When the bill came to the floor of the House of Representatives, Congressman Cox recognized that the criterion of nationality left no room for distinguishing between the friendly and the unfriendly enemy nationals 94 Cong. Rec. 551. It seems perfectly clear to us then that Section 39 of the *Trading With the Enemy Act* was intended to apply to all German and Japanese nationals living in the United States or elsewhere whose property had been vested. *Shill* v. *McGrath,* 89 F. Supp. 339 (S. D. N. Y. 1950).

But even friendly nationals of Germany or Japan are not barred from *all* relief under the *Trading With the Enemy Act.* Section 32 of the Act empowers the President to make discretionary administrative returns of World War II vested property to various specially designated classes of persons; Section 32 was specifically exempted from the rigorous effect of Section 39, *Shill* v. *McGrath, supra.* But as we held in *McGrath* v. *Zander, supra,* the right of return under Section 32 is ad-

ministrative and discretionary, and there is no right to review the judgment of the administrative authorities. Consequently the judgment of the lower court is affirmed.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 958402 940

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SEP 6 1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 169

J. HOWARD McGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN,

Petitioner,

vs.

KAKU NAGANO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court (R. 33-37) is reported at 88 F. Supp. 897. The opinion of the Court of Appeals (R. 54-65) is reported at 187 F. 2d 759.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED.

The questions presented by the petition are more adequately stated as follows:

1. Whether Section 39 of the Trading with the Enemy Act was intended to affect the right of return of property under Section 9(a) of the Act in a suit which was

(a) pending before the passage of Section 39; and
(b) brought by an alien admittedly resident within and loyal to the United States?

2. Whether in holding that respondent's temporary and transitory presence in Japan did not constitute her an enemy within the meaning of the Trading with the Enemy Act, the court below correctly applied to the particular facts of the present case the rule of construction which has been uniformly followed in the federal courts in repeated decisions since the enactment of the statute in 1917?

The petition alleges no conflict of decisions or other adequate grounds for requesting the Court to grant a review with respect to the second question.

STATUTES INVOLVED.

The statute involved is the Trading with the Enemy Act of 1917, as amended, with particular reference to Section 9(a) and the asserted effect upon it of Section 39 as enacted subsequent to the filing of the present suit. Indirectly involved, as they bear upon questions of construction, are other sections. The relevant sections and Executive Orders are set forth in the Appendix, *infra*.

STATEMENT.

These proceedings are concerned with a wife's minority interest[1] in her husband's company, The Fuji Trading Company, a corporation of Illinois organized in 1912. The present suit was filed on December 19, 1947 under Section 9(a) which provides for the return of vested property to persons who establish that they are non-enemies.

The Fuji Trading Company sells oriental food products such as chop suey vegetables and sauces, bean sprouts and water chestnuts, all of which are produced in the canning factory at 441 Huron Street, Chicago, erected and owned by the husband, Shinsaku Nagano, and leased to the business for the purpose of its operations (R. 3). The business itself was founded in 1910 by Mr. Nagano and under his sole management and direction it has for many years enjoyed national distribution of its products (R. 3, 55). The business has been described as Mr. Nagano's *alter ego.*[2] In time of war the business had no significance from a defense standpoint.

Mr. Nagano's permanent residence here (since 1906) and his loyalty to this country have never been questioned. They are material facts in view of the devotion between husband and wife and the common family plans which led to the wife's temporary absence in Japan. The husband's status is not merely technical; his identity with the com-

1. Out of 15,000 authorized and issued shares, the husband owns 9,315 shares and the wife owns 5,670 shares here involved, the remaining 15 shares being owned by her brother, who resides at Wilmette, Illinois, and is employed as the factory manager (see opinion, *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753, 755 *et seq.*).

2. See opinion, *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753, 755.

munity deep rooted. His investments are substantial and permanent. They have been always in Chicago, never in Japan. Mr. Nagano's testamentary plan for himself and his wife under his will executed in 1930 confirmed their Chicago residence and named a Chicago bank as trustee of his estate. He has been active in the affairs of the community, receiving, for example, the commendation of Rufus F. Dawes for his contributions as chairman of the Japanese Committee during the Century of Progress Exposition[2a].

No action has ever been taken against Mr. Nagano under the Trading with the Enemy Act. As a native born Japanese, however, under our naturalization laws he was not eligible to enjoy the privilege of citizenship in this country, and therefore he would be a national of Japan within the meaning of Section 39 if the position taken by petitioner were sound. Nevertheless, property of his which had been mistakenly vested in the belief that it belonged to an enemy has recently been returned to him in a Section 9(a) proceeding: *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753 (C. A. 7th, 1951). Petitioner has not sought a review of the latter decision and has therefore acquiesced in it.

At the outbreak of the war Mrs. Nagano was in Japan for temporary family purposes which were shared equally by herself and her husband, that is to say, making arrangements for the marriages of their two daughters.[3] It has never been claimed by the government that the husband's status as a loyal resident was affected by the family plan,

2a. Such evidence (in support of allegations of residence, R. 2, 6, 7, and admitted by motion to dismiss) is familiar to petitioner as part of the record in *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753.

3. Born in Japan, respectively, in 1914 prior to respondent's immigration to the United States, and in 1919 during a stay in Japan while on a voyage occasioned by Mr. Nagano's convalescence from influenza suffered during the severe epidemic of that year.

but because of the wife's physical presence in Japan not for any individual purpose but rather in carrying out the family purpose shared with her husband, the minority shares of stock owned by her in her husband's company were vested by the Alien Property Custodian. The Court below decided that on the allegations of the complaint the wife's temporary presence in Japan did not make her a resident within that country and that along with her husband she is a loyal resident of the United States. The petition for certiorari proceeds primarily upon the contention that, conceding the wife's friendly resident status as an ultimate fact, Section 39 of the Trading with the Enemy Act nevertheless prevents the return of her minority interest in her husband's company.

After residing in the United States since her immigration to this country in 1915, Mrs. Nagano in 1924 commenced the task of giving her son[4] the Oriental education which her husband considered an indispensable qualification to the son's ultimate entry into his father's business. Most of the raw materials used by the company were imported from the Orient by Mr. Nagano on purchasing trips which he was required to make once each year (R. 6). It was the common plan of both parents that Mr. Nagano might ultimately be relieved by their son of this extensive traveling in the Orient and left free to devote his entire time to the management of the business in Chicago.

A Japanese education for the daughters was considered desirable in order to enhance their prospects for marriage, limited as these were to members of their own race. All choice of decision on bringing the daughters to the United States was removed forever by the Oriental exclusion provisions of the Immigration Act of 1924, 43 Stat. 153, 8 U. S. C. A. 201 *et seq.* (R. 6, 19, 20, 56). In commencing the above task in furtherance of the purposes of the mar-

4. Born in Chicago in 1916.

riage of respondent and her husband, it was of course a fact that neither husband nor wife ever contemplated that the wife would be abandoning her permanent family residence with her husband in the United States or that she would be establishing a separate residence elsewhere (R. 6). The wife merely undertook a temporary family mission for reasons which were praiseworthy, which involved personal self sacrifice, and which were entirely consistent with her continued attachment to the United States as her residence and family home.

Mrs. Nagano rejoined her husband at Chicago in 1929 and again in 1932, each time remaining for nearly a year. In administrative proceedings the Department of Justice (Immigration Service) has found as a fact that on both of these occasions she entered as a permanent resident returning from a temporary absence abroad (R. 51). Absences from the United States prior to 1933 are therefore not material to the case. The factual issue presented by the above second question is whether the period from 1933 to 1941[5] represented a temporary and transitory absence, having in mind that the facts are undisputed and all inferences favorable to respondent are admitted by the motion to dismiss (R. 28-32).

In 1933 one daughter had already attained marriageable age; the other daughter would do so by 1937 (R. 6), and the son was old enough so that his mother's presence would no longer be necessary during the completion of his university education. During Mrs. Nagano's absence from 1933 to 1941 her efforts were devoted almost exclusively toward arranging marriages for the daughters (R. 6, 19). A record of these efforts is preserved in Mr. Nagano's voluminous correspondence (R. 7, 20), all written years

5. The war eliminated all possibility of return after 1941 until permission to return was obtained in 1950 (R. 49-51). Hence only the period 1933-1941 is involved.

before any such correspondence could be regarded as self serving. Her letters to her husband establish that progress was being made and that she had a lively expectation of an early consummation of her duties followed by a prompt and final return to the United States.

Such facts and others, including the corroborating testimony of persons in Japan, were reviewed by the United States Department of State in granting a visa under Section 4 (b) of the Immigration Act to Mrs. Nagano as a permanent resident returning from a temporary absence abroad (R. 49-50). Subsequently, upon respondent's physical entry into the United States, the Justice Department, Immigration Service, taking note of the period of absence, convened a Board of Special Inquiry which made a *de novo* investigation and then, on the basis of all the facts, the Immigration Service reached the conclusion (R. 50) that

> "there is ample evidence of record to support the conclusion reached by the Board of Special Inquiry and the American Consular Service that the Appellant is returning from a temporary visit abroad."

ARGUMENT.

I.

THERE IS NO CONFLICT OF DECISIONS ON EITHER OF THE TWO ISSUES RELIED UPON BY THE PETITIONER.

1. There is no conflict of decisions between the Courts of Appeals for the Seventh Circuit and for the District of Columbia on the issue of whether Section 39 of the Trading with the Enemy Act applies to a Section 9(a) suit *pending before the enactment of Section 39.*[6] Under such circumstances neither court considers Section 39 to be applicable to the *Nagano* case.

In the case of *McGrath* v. *Zander*, 177 F. 2d 649, 652 (1949), the Court of Appeals for the District of Columbia had before it a Section 9(a) suit filed before the enactment of Section 39 but not decided until subsequent thereto. In the briefs the government relied upon Section 39, contending that plaintiff was a German citizen and therefore a "national" of Germany within the prohibitions of Section 39. The court held, however, that regardless of questions of nationality plaintiff was entitled to recover since she was not "resident within" Germany,—a conclusion which could not have been reached if Section 39 had been held to be applicable.

In the case of *Guessefeldt* v. *McGrath*,[7] which is the very case relied upon by the petitioner for the alleged conflict of decision concerning Section 39, the *Zander* case was distinguished by the District Court on the ground that it

6. The present case was filed December 19, 1947 (R. 2). Section 39 was enacted on July 3, 1948.

7. Pending before this Court on petition for certiorari, October term, No. 204.

was filed before the enactment of Section 39, the court stating (89 F. Supp. 344, 348):

> "Plaintiff relies heavily on the *Stadtmuller* case, *supra*, decided in 1926, and the *Zander* case, *supra*, decided by our Court of Appeals in 1949. The *Stadtmuller* case was decided long before the enactment of Section 39 of the Act and cannot be controlling here. While reference is made to Section 39 in the briefs submitted to the Court in the *Zander* case by the parties thereto and by the *amici curiae*, it should be noted that that case was filed in this Court on March 24, 1948, while Section 39 was not passed by the Congress and approved by the President until July 3, 1948."

The distinction made by the Court was a substantial one. The federal statutes contain an express saving clause to the effect that when a statute is repealed the repeal shall not release any liability incurred under the statute unless the repealing Act shall expressly so provide: Title 1 U.S.C.A. 109 (*infra*, App. p. v). This statute has been held to be a rule of construction applicable when not otherwise provided, as a general saving clause to be read and construed as a part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress: *Hertz* v. *Woodman*, 218 U. S. 205, 216, 217 (1910). Section 39 does not specifically mention Section 9(a) and is not a bar to the instant action unless it is assumed that Congress intended a retroactive repeal of Section 9(a) by implication. The argument that Section 9(a) was repealed, in whole or in part, by mere implication, is completely refuted by *Markham* v. *Cabell*, 326 U. S. 404, 410 (1945). In that case the Custodian made a similar contention that the Settlement of War Claims Act of 1928 effected a partial repeal by implication of Section 9(a) and the Court replied,

> "The right to sue, explicitly granted by Section 9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission."

But the thought that Congress could have intended to take such action retrospectively with respect to residents who are entitled to the protection of the Fifth Amendment to the federal Constitution is repugnant to our sense of justice. Retroactive legislation is not favored by the courts and retroactive construction is not given to legislation unless the language employed is so clear that it will admit of no other construction.[8] No court has ever suggested that Section 39 should be given retroactive application. There is no conflict whatsoever on this point.

2. The Court of Appeals for the Seventh Circuit and the Court of Appeals for the District of Columbia are in complete accord with each other and with the cases decided since the enactment of the Trading with the Enemy Act in 1917 with reference to the issue of whether or not respondent must be regarded as "resident within" Japan.[9]

Having sought to bring the Section 39 issue before the Court on the ground of an alleged conflict between circuits, the petitioner is in the position of seeking review upon the independent and wholly unrelated issue of "residence within" without the grounds ordinarily recognized by the Court as a basis for seeking review by certiorari. Indeed, it is not even claimed by petitioner that any conflict of decisions exists on the latter issue.

In the *Guessefeldt* case the District Court and the Court of Appeals were both in agreement with the holding below in the Nagano case on the meaning of the term "resident within." The District Court held that in order for Guessefeldt to have established residence in Germany there would have had to be both an intention to abandon the old and to remain in the new domicile—as some authors say, *animus*

8. Sutherland on Statutory Construction (3rd Ed., 1943), Vol. 2, Secs. 2201, 2212.

9. For cases in accord, see cases cited, *infra*, p. 18.

non revertendi and *animus manendi*.[10] On appeal, the Court of Appeals for the District of Columbia agreed with the District Court, citing *McGrath* v. *Zander*, 177 F. 2d 649, decided by that Court in 1949, and stating that the *Zander* case affirmed the rule in *Stadtmuller* v. *Miller*, 11 F. 2d 732 (C.C.A. 2d, 1926). It was specifically stated that, except for the provisions of Section 39, Guessefeldt would have been entitled to maintain a Section 9(a) suit.

It would seem apparent that if the Supreme Court should see fit to grant certiorari the scope of the review ought to be confined to Section 39 with respect to which the petitioner has claimed that there exists a conflict between two circuits.

II.

THE DECISION BELOW IS CLEARLY CORRECT.

1. In enacting Section 39 Congress had no intention of amending Section 9(a) providing for the return of friendly property. On the contrary, the concern of Congress was with a wholly different object, namely, to express the irrevocable policy decision that *enemy* property would not ever be returned to former enemies as was done after World War I.[11] This intention is plainly evident from the *functions* of Section 39 within the framework of the related provisions of the Act. It is no less evident from the language of the Act and from its legislative history.

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10. 89 F. Supp. 344, 347.

11. So held below in the District Court (R. 36-37) and in the Court of Appeals (R. 64).

(a) *Functions of Section 39.* Initially property is seized by the Alien Property Custodian on suspicion that it is enemy property, the action being taken on appearances and without investigation.[12] By definition, Section 9(a) is a proceeding for the return of property to "*any person not an enemy* claiming any interest, right or title in any money or other property which may have been seized by him" (the Custodian).[13]

Under Section 2(a) of the Act "residence within" the enemy country is made the test for determining whether an individual is an "enemy",[14] so that in a Section 9(a) suit the issue is made to turn upon residence and not upon nationality. In World War II the necessity of coping with disguised enemy interests gave rise to a broadened concept of "enemy" as expressed in the term "national of a designated enemy country."[15] The broadened term permitted persons, even United States citizens, to be defined as such "nationals" if they were acting on behalf of ("including cloaks for") the enemy.[16] The residence test, however, was retained, with the result that persons not "resident

12. "If he has a strong suspicion that property is German property it is his conscientious duty to vest it. Subsequent investigation may indicate that he was *mistaken*, and in such a case he will return the property":—testimony of Max Isenbergh, Chief, Appeals and Legislative Branch, Office of Alien Property, Justice Department, given before subcommittee of the Senate Committee on the Judiciary in hearings on the War Claims Act, 80th Congress, Second Session, page 13 of printed report of hearings. See also *Clark* v. *Uebersee Finanz-Korporation*, 158 F. 2d 313 at 315 to the same effect. And see *Lamar* v. *Browne*, 92 U.S. 187, 196 (1875): "The military forces act in the field, according to the laws of war and seize that which is *apparently* the subject of capture. They act upon appearances, not upon testimony * * *"

13. See Section 9(a), *infra*, App. p. i.

14. Section 2(a), *infra*, App. p. i.

15. Defined in Executive Orders 8389 and 9095 promulgated under the authority of Section 5(b), *infra*, App. pp. i, iii, iv.

16. Executive Order 8389, par. 5E(ii, iv), *infra*, App. p. iii.

within" the enemy country are not considered "nationals" thereof by reason of enemy citizenship alone.[17] Indeed, it is this issue of whether Mrs. Nagano was "resident within" Japan which petitioner seeks to have reviewed by this Court.

Section 9(a) is, therefore, concerned exclusively with the return of non-enemy (that is to say, friendly) property, determined according to the test of residence.

After Section 9(a) returns have been completed, the fund of property remaining in the hands of the Custodian consists of enemy property alone. Obviously it is necessary to look elsewhere in the Act than Section 9(a) to ascertain what disposition is contemplated for this enemy fund. A direct provision in this regard is found in Section 12, providing:

> "After the end of the war any claim of any enemy or ally of enemy to any money or other property held by the Alien Property Custodian * * * shall be settled as Congress shall direct."

After the end of World War I the fund of enemy property referred to in Section 12 was first retained under the provisions of the Resolution of Congress terminating the war with Germany, July 2, 1921, 42 Stat. 105-107, and finally returned in part (80% returned, 20% retained) under the Settlement of War Claims Act of 1928, 45 Stat. 254-279.

After the end of World War II two sections provided for the disposition of the fund in question: Section 32(a) and Section 39. Section 32(a) provided for returns as a matter of administrative discretion to persecutees and other individuals who are technically enemies and who would not be entitled to the return of property under Section 9(a).[18]

17. See authorities and exception in Executive Order 9095 cited and discussed, *infra*, pp. 16, 17.

18. *McGrath* v. *Zander*, 177 F. 2d 649, 652 (C.A.D.C. 1949); see Sec. 32(a), *infra*, App. p. ii, containing pertinent provisions omitted from the reproduction of that section in the government's petition, Appendix A therein.

Section 39 provides that "*The net proceeds remaining upon the completion of administration, liquidation and disposition pursuant to the provisions of this Act*" shall not be returned to nationals of Germany or Japan, but "shall be covered into the Treasury" to be applied in payment of certain war claims.[19]

If Section 39 is considered solely from the standpoint of its mechanical function, it will be seen that there are only two possible functions, as follows:

> (i) To dispose of the "net proceeds" remaining in the hands of the Custodian after administration, liquidation, and disposition pursuant to the other provisions of the Act. Such proceeds consist of the fund of enemy property remaining after the property taken by mistake has been returned, under Section 9(a), to non-enemy owners as a part of the "disposition" referred to in Section 39. It is the same fund of enemy property which remained after the end of World War I, 80% of which was ultimately returned to former enemies not pursuant to Section 9(a) but as a forgiveness measure.

The Court below held that the foregoing is the function of Section 39.

If the function of Section 39 is not as above stated then, alternatively, the function *must* be:

> (ii) To retain, in addition to enemy property, all property whether taken by mistake or not, and whether in friendly hands or not, which belongs to persons who are citizens of Germany or Japan regardless of whether such persons are lifelong loyal residents of the United States.[20]

The second function represents the position asserted by the petitioner herein.

It is readily apparent that the second function is un-

19. *Infra*, App. p. iii.

20. As asserted by the government in *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753; see *supra*, p. 4.

conscionable and that it has no logical relationship to the framework of the Act. No such relationship is suggested in the petition. In contrast, the first function permits the parts of the Act—Sections 9(a), 12, 32(a) and 39 to work together as parts of an integrated whole.[21]

(b) *Language of Section 39.* (i) As has been pointed out in discussing the functions of Section 39, the subject matter upon which it operates is not all property vested, but only "net proceeds" consisting of enemy property remaining after Section 9(a) returns as a part of the "administration, liquidation and disposition pursuant to the provisions of this Act."[22] The return of non-enemy property under Section 9(a) is essential to the constitutionality of the Trading with the Enemy Act: *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 566 (1920); *Becker* v. *Cummings*, 296 U. S. 74, 79 (1935). Only the remaining net fund consisting of enemy property is without the constitutional protection.

Since the fund dealt with by Section 39 consists only of enemy property not returnable under Section 9(a) it is immaterial to the present case that the latter fund may not be returned to "nationals" of Germany or Japan even if such "nationals" are assumed to include friendly American residents.

Section 32(a) contains specific provisions for the return of certain enemy property to persecutees who are technical enemies.[23] Thus it was essential that Section 39 should in-

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21. In *Markham* v. *Cabell*, 326 U.S. 404, in holding to the effect that by amending Section 5(a) Congress did not intend to delete Section 9(a) the court said: "The normal assumption is that where Congress amends only one section of a law, leaving one untouched, the two were designed to function as parts of an integrated whole."

22. Section 9(a) contains both administrative and dispository provisions.

23. *Supra*, p. 13 and note 18.

clude an express exception as to Section 32(a). The fact that Section 9(a) is not referred to in Section 39 does not evidence any intent to repeal Section 9(a) but on the contrary evidences that Section 9(a) is concerned with a wholly different fund, *i. e.*, friendly property.

(ii) Even if the entire issue with respect to Section 39 is made to turn upon the literal meaning of one word, "national",[24] without regard to any of the foregoing considerations, the same result is still reached. In Section 39 the word "national" is used in the sense of "national of a designated enemy country" (except that it is restricted to the enemy countries of Germany and Japan). The word is necessarily used in such a sense because "nationals of a designated enemy country" are the only class of nationals made subject to the vesting process in the first place.[25] Such enemy nationals, however, could not in any event succeed under Section 9(a): *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 486, 487 (1947). Their suit would fail, under the provisions of Section 9(a), not Section 39.[26] Conversely, a person who is entitled to recover under Section 9(a) succeeds because he has been found not to be a "national of a designated enemy country"; he is equally not a "national" within the meaning of that word as used in Section 39. Moreover, persons who are residents of the United States or who were not "resident within" the enemy country are not "nationals of a designated enemy country." Executive Order 9095, as amended, excludes from the definition of such "nationals" persons not within the enemy country;[27] neither the President nor the Con-

24. The decision in the *Guessefeldt* case and the argument of the government are predicated almost entirely on the asserted literal meaning of the word "national."

25. *See*. 5(b) and Executive Orders 8389 and 9095, *infra*, App. pp. i, iii, iv.

26. Precisely as stated by Judge Campbell (R. 36).

27. *Infra*, App. p. iv.

gress has at any time modified the traditional policy of this country that our own residents are not enemies, regardless of technical enemy citizenship; the courts have held likewise;[28] and finally, the government's petition itself (pp. 6, 11-13) agrees that "residence within" is the fundamental issue determinative of whether respondent is a "national of a designated enemy country."

The opinion of the court below respecting the true meaning of "citizen" (R. 64) thus corresponds with the literal and technical meaning of the word "national" as used in Section 39.

(c) *The legislative history.* The legislative history of Section 39 prior to its passage is notable for the absence of any reference to Section 9(a) in the hearings or in the Congressional debates. The expression of any intention to repeal or supersede the latter section is totally absent. Especially notable, however, is the abundance of affirmative evidence that the legislators were concerned solely with the net fund of *enemy* property remaining after administration and disposition under existing law, including returns provided under Section 9(a). The scope of the present brief makes it impracticable to review here the legislative history (portions of which are set forth in the opinion of the court below, R. 61, 63, 64). It is, however, respectfully submitted that the non-applicability of Section 39 to proceedings under Section 9(a) is fully evident from a consideration of the functions and language of the two sections within the framework of the Act.

2. There is no merit in the remaining contention of petitioner, namely, that respondent was "resident within" Japan, nor is there any merit in the related claim that any question of construction exists respecting the words "resident within" as used in the statute.

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28. Opinion below (R. 59-60); *Guessefeldt* v. *McGrath* (not yet reported), see petition herein for certiorari, Appendix B, p. 24; *McGrath* v. *Zander*, 177 F. 2d 649 (C.A.D.C., 1949).

One indication of the lack of merit to petitioner's contention is the complete accord of the decisions below, in the instant case and also in the companion *Guessefeldt* case, as well as the prior decisions including *McGrath* v. *Zander*, 177 F. 2d 649 (C. A. D. C. 1949); *Sarthou* v. *Clark*, 78 F. Supp. 139 (D. C. Cal., 1949); *Stadtmuller* v. *Miller*, 11 F. 2d 732 (C. C. A. 2d, 1926); *Vowinckel* v. *First Federal Trust Co.*, 10 F. 2d 19 (C. C. A. 9th, 1926); and *Miller* v. *Sinjen*, 289 Fed. 388 (C. C. A. 8th, 1923). All of these cases support the reasonable principle that presence in a country for purposes of a merely temporary character falls short of establishing residence. Seldom indeed has there been a more consistent *absence* of conflict among the decisions.

It is not possible for legal niceties to arise as to what "resident within" means in the face of facts alleged or competent under the complaint including (a) respondent's admitted residence in the United States (R. 2, 3, 51); (b) her admitted lack of any intention to surrender that residence (R. 3, 51); (c) the circumstances of compulsion characterizing her absence in Japan (R. 6, 7, 19, 20); (d) the admitted temporary character of that absence (R. 6, 7, 19, 20, 51); and (e) the concurrence of the State Department and the Justice Department, after independent investigations and hearings, in the finding that Mrs. Nagano was a permanent resident of the United States whose absence in Japan was a temporary visit only (R. 49-51).

Taken in combination, the foregoing considerations surely foreclose any conclusion at this time that respondent was "resident within" Japan. Having been correct on the facts, the decision below presents no need for any construction of the phrase "resident within".

Moreover, it is implicitly admitted in the government's petition and brief (pp. 11-13) that the mere presence of

respondent in Japan would not make her a "resident within" an enemy country if two conditions are met: (1) that her presence was the result of compulsion or (2) that her presence was temporary. Not just one but both of these conditions are met in the present case.

Petitioner has contended that Mrs. Nagano's stay in Japan was an exercise of free choice. But as already stated, her daughters were compelled by our immigration laws to make their permanent home in Japan. The daughters could not plan a life in this country because, being of Japanese birth, they could not be here more than temporarily under any circumstances. The election to arrange marriages in Japan was compulsory because our immigration laws made it so. Moreover it was an act of both husband and wife, in carrying out a duty of their marriage.

The choice offered to Mr. and Mrs. Nagano was as "voluntary" as a parent voluntarily paying a ransom to a kidnaper. They did indeed have a choice; they could abandon their children or the wife could remain with them in Japan for the temporary period during which the presence there of one of the parents remained indispensable. Mrs. Nagano remained in Japan, but that she did so only under the compulsion of these circumstances is established by a mass of evidence, including a great deal of correspondence with her husband (R. 7, in evidence in the companion case of *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753, no review of which decision has been sought by the government). Certainly, petitioner cannot contend that the compulsion must be exercised by the enemy government. It would be intolerable for the United States to justify the seizure of property because of a temporary absence of the owner for which the United States itself was largely responsible.

Moreover, it is significant to consider that in all the

decided cases involving presence in the enemy country the original entrance into or sojourn within the country was invariably voluntary. Only after the commencement of hostilities did constraint arise: *Vowinckel* v. *First Federal Trust Co.*, 10 F. 2d 19 (C. C. A. 9th, 1926); *Stadtmuller* v. *Miller*, 11 F. 2d 732 (C. C. A. 2d, 1926); *Miller* v. *Sinjen*, 289 Fed. 388 (C. C. A. 8th, 1923); *Sarthou* v. *Clark*, 78 F. Supp. 139 (D. C. Cal., 1949); *McGrath* v. *Zander*, 177 F. 2d 649; *cf.* also the related case, *Guessefeldt* v. *McGrath*, now pending before this Court on petition for certiorari. Plainly Mrs. Nagano, as a native-born Japanese, had not the slightest opportunity of gaining readmission to this country or permission to depart from Japan after the war began.

The question whether the period of 1933 to 1941 represented a temporary absence is a fact question dependent not on the length of the period but on the circumstances of the absence. The very reasons for the absence were of a self limiting character. Both Mrs. Nagano and her husband expected the marriages to be arranged within a relatively short period. Her correspondence reported progress; in fact, on occasion, arrangements were all but completed. In the plans of Mrs. Nagano and her husband her absence in Japan was not only transitory but in effect she was packed and ready to leave by the next ship. Also it must be remembered that the evidence includes not only the purpose of the absence but the whole background of circumstances establishing the permanent American residence of both husband and wife. These circumstances, too, bear upon the temporary character of Mrs. Nagano's absence. It is neither realistic, nor just, nor consistent with the facts and inferences admitted by a motion to dismiss, for petitioner to urge that Mrs. Nagano was resident within Japan.

On the basis of the admitted facts no borderline case is

presented which involves, as urged by the government, any question of construction of the words "resident within". The fallacy of petitioner's position is that instead of presenting a substantial question of law, petitioner is merely seeking to draw inferences in direct conflict with the admitted facts.

In its petition and brief the government makes the incorrect statement that the Court below equated residence to domicile. Petitioner then argues the well known rule that residence is not identical with domicile. Of course the obvious answer is that the court below was not even concerned with domicile. It was concerned only with residence, within the settled meaning which has been given to that term by the courts through a long series of cases (R. 59). No need for subtleties of definition exists to recognize the simple fact that although one may have a residence which is different from the domicile one may also be present in a locality without being a resident. Residence, in other words, is something more than a transitory stay or a visit for temporary purposes. Like domicile, residence does involve an intent to establish residence and it involves a certain stability; in effect it involves at least a settled and permanent abode partaking to some degree of domiciliary qualities, as stated in *Sarthou* v. *Clark*, 78 F. Supp. 139 (D. C. Cal., 1949), quoted and approved in *McGrath* v. *Zander*, 177 F. 2d 649 (C. A. D. C., 1949).

The government has made the additional assertion that the holding below with regard to residence is "in conflict in principle with numerous decisions" (Brief, pp. 6, 13n). This not only overlooks the pertinent cases which are in complete accord on the issue of residence (cases cited *supra*, page 18), but it misses the fact that out of the long list of cases cited by the government (Brief, p. 13n), not one case can be found involving a suit under Section

9(a) of the Trading with the Enemy Act. Moreover not a single one of the cases cited by petitioner involves the question of defining the words "resident within."[29]

III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

Since the decision below was right on the facts; since the decision below was in accord with the settled line of authority on the "resident within" issue; and since there exists no conflict with other decisions, no important question is presented to this Court on the issue of respondent's residence.

In addition to the fact already pointed out that the present suit was filed before the enactment of Section 39 so as to present no questions under that Section, it would be equally true that no important question arises under Section 39 even if that Section were to be given a retroactive application.

(a) In order that there may be a question there must exist at least some reasonable doubt as to the correct application of Section 39. As has been demonstrated the fund dealt with by Section 39 consists entirely of enemy property. Prohibitions respecting a fund consisting only of enemy property cannot affect suits arising under Section 9(a). Therefore no significance whatever can attach to the statement in the petition as to the number of suits pending[30] under Section 9(a).

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29. In each case cited the parties were admittedly residents within the enemy country; in three of the cases (*Faber* v. *United States*, 10 F. Supp. 602; *Miller* v. *Paul*, 237 Ill. App. 166; and *Wirtele* v. *Grand Lodge*, 111 Neb. 302) the parties not only lived in but died in Germany; and another case, *United States* v. *Krepper*, 159 F. 2d 958 (C.A. 3rd, 1946), was a criminal prosecution for a violation of a censorship statute in writing a letter in time of war to an enemy agent.

30. Petition, p. 14.

(b) Any property belonging to an American resident has been vested either in error or because he is deemed to be an enemy on grounds other than nationality. In such case, if he is an enemy, a Section 9(a) suit would fail on that ground. *It is extremely difficult to believe that the government is asserting that it has vested any consequential amount of property belonging to American residents who are not enemies.* It is to be doubted that any such startling interpretation should be drawn from the meager statement in the government's petition for certiorari (p. 14) that 47 cases are pending which "involve" Section 39. The manner in which Section 39 is involved is not stated, but the more probable interpretation is that in suits brought by persons who are allegedly enemies Section 39 is being invoked as a defense notwithstanding that a defense exists under Section 9(a). In such case the assertion that Section 39 is involved is meaningless.

Conclusion.

It is accordingly submitted that no conflict between circuits exists with reference to the matters upon which review is sought; that the judgment of the Court below was correct; that no important issues of law are involved, and that the petition for certiorari should be denied.

In the event that the Supreme Court should nevertheless determine that a review should be granted, it is submitted that the scope of the review should be expressly limited to the single issue upon which any claim of conflict between circuits is made by the government; that is to say, the alleged applicability of Section 39 to proceedings under Section 9(a) of the Trading with the Enemy Act.

Respectfully submitted,

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APPENDIX.

Excerpts from the Trading with the Enemy Act of 1917, as amended (U. S. C. A. Title 50 Appendix):

§ 2. Definitions. The word "enemy" as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual * * of any nationality, resident within the territory * * of any nation with which the United States is at war * *.

§ 5(b) (as amended on December 18, 1941 by Title III of the First War Powers Act (U. S. C. A. Title 50, pocket part, Appendix Sec. 5(b)). During the time of war * * any property or interest of any foreign country or national thereof shall vest when, as and upon the terms directed by the President * *.

§ 7(c). If the President shall so require any money or other property * * belonging to or held * * for the benefit of, an enemy * * may be seized by the Alien Property Custodian * *.

§ 9(a). Any person not an enemy * * claiming any interest, right or title in any money or other property which may have been seized by him (the Custodian) hereunder * * may file with the said custodian a notice of his claim * *. * * if the claimant shall have filed the notice as above required, said claimant may institute a suit in equity * * in the district court of the United States for the district in which such claimant resides * * to established the interest, right, title or debt so claimed, and if so established, the court shall order the * * delivery to said claimant of the money or other property so held by the Alien Property Custodian.

§ 12. * * After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct * *.

§ 32(a). The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

(2) that such owner, and legal representative or successor in interest, if any, are not—

* * * * *

(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section (March 8, 1946) was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory, Provided That notwithstanding the provisions of this subparagraph (D) return may be made to an individual who, as a consequence of any law, decree or regulation of the

nation of which he was then a citizen or subject, discriminating against political, racial or religious groups, has at no time between December 7, 1941 and the time when such law, decree or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation; * *

§ 39 (War Claims Act of 1948, Public Law 896, 80th Congress, 2nd Sess.) No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agent of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered (sic) into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of Section 32 of this Act or of the Philippine Property Act of 1946.

Excerpts from Executive Order 8389 (April 10, 1940, 5 F. R. 1400 as amended by Ex. Ord. No. 8785, June 14, 1941, 6 F. R. 2897; Ex. Ord. No. 8832, July 26, 1941, 6 F. R. 3715; Ex. Ord. No. 8963, Dec. 9, 1941, 6 F. R. 6348; Ex. Ord. No. 8998, Dec. 26, 1941, 6 F. R. 6787):

5. * * E. The term "national" shall include,

(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order, * *

(ii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, and

(iv) Any other person who there is reasonable cause to believe is a "national" as herein defined * *.

Excerpts from Executive Order No. 9095 (March 11, 1942, 7 F. R. 1971, as amended Ex. Ord. No. 9193, July 6, 1942, 7 F. R. 5205; Ex. Ord. No. 9567, June 8, 1945, 10 F. R. 6917):

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

(a) Any business enterprise within the United States which is a national of a designated enemy country * * and any interest of any nature whatsoever in such business enterprise held by an enemy country or national thereof;

(b) Any other business enterprise within the United States which is a national of a foreign country * * and any interest of any nature whatsoever in such business enterprise held by a foreign country or national thereof, when it is determined by the Custodian and he has certified to the Secretary of the Treasury that it is necessary in the national interest, with respect to such business enterprise, either (i) to provide for the protection of the property, (ii) to change personnel or supervise the employment policies, (iii) to liquidate, reorganize or sell, (iv) to direct the management in respect to operations, or (v) to vest.

10. For the purpose of this Executive Order:

(a) * * The term "national" shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended, *provided, however*, that persons not within designated enemy countries * * shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy occupied country or area; or (iii) that

the national interest of the United States requires that such person be treated as a national of a designated enemy country.

1 U. S. C. Sec. 109. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall expressly so provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

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Dept. of State Bulletin, Vol. XXV, Aug. 27, 1951 (Treaty with Japan) 29, 36
Goodrich, *Conflict of Laws* (2d ed., 1938) 48, 53
Hearings before a Sub-committee of the Senate Committee on the Judiciary, 80th Cong., 2d Sess. on H. R. 4044 ..... 24, 26-27

Page
H. Rep. 976, 80th Cong., 1st Sess. 24, 25-26
H. Rep. 1507, 77th Cong., 1st Sess. 22
H. R. 4044, 80th Cong., 2d Sess. 23
Hyde, *International Law Chiefly as Interpreted and Applied in the United States* (1947) § 342 36
Kennan, *Residence and Domicile* (1934) 42
Moore, *Digest of International Law* (1906), Vol. III 36
Restatement, *Conflict of Laws* (1934 ed.), § 21e 48
S. Doc. 348, 67th Cong., 4th sess., vol. III, pp. 3329-3522 18
S. Rep. 911, 77th Cong., 1st Sess. 22
S. Rep. No. 1839, 79th Cong., 2d Sess. (1946) 23
Sutherland on Statutory Construction (2d ed. 1943) § 2016 30
United States Treasury Department, *Administration of the Wartime Financial and Property Controls of the United States Government* (1942), pp. 29-31 20
Wharton, *Law Lexicon* (14th ed., 1938) 36

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 169

J. HOWARD MCGRATH, Attorney General, as Successor to the Alien Property Custodian,
Petitioner,

v.

KAKU NAGANO

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court for the Northern District of Illinois, Eastern Division (R. 33-37), is reported in 88 F. Supp. 897. The opinion of the Court of Appeals for the Seventh Circuit (R. 54-65) is reported in 187 F. 2d 759.

JURISDICTION

The judgment of the Court of Appeals was entered on February 26, 1951 (R. 65). A timely petition for rehearing was denied on April 4, 1951

(R. 66). The petition for a writ of certiorari was filed on July 3, 1951, and was granted on October 8, 1951 (R. 69). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the provision of Section 39 of the Trading With the Enemy Act that no property of any national of Germany or Japan vested after December 17, 1941, shall be returned to the former owner prohibits recovery of such property in a suit brought under Section 9(a) of the Act by a Japanese citizen, regardless of whether the plaintiff would otherwise be eligible to maintain suit under Section 9(a).

2. Whether a citizen of Japan, who lived in Japan continuously from 1924 to 1950 for the purpose of procuring a Japanese education for her children and arranging Japanese marriages for her daughters, was "resident within" Japan and therefore an "enemy" ineligible to maintain suit under Section 9(a).

STATUTES INVOLVED

The relevant provisions of the Trading With the Enemy Act, as amended, of the Executive Orders issued thereunder, and of other pertinent statutes and treaties, are set forth in the Appendix, *infra*, pp. 55-73.

STATEMENT

By Vesting Order No. 813, dated February 2, 1943, the Alien Property Custodian[1] vested in himself 8,780 shares of the common stock of the Fuji Trading Company, an Illinois corporation, as the property of the respondent Kaku Nagano, upon a finding that she was a national of Japan, a designated enemy country (R. 10-11).

On December 19, 1947, respondent filed in the District Court for the Northern District of Illinois (Eastern Division) a compiaint under § 9(a) of the Trading With the Enemy Act. She alleged, generally, that she was a permanent resident of the United States who had been "physically but temporarily" in Japan without having abandoned or intended to abandon her domicile in the United States and that she was not an "enemy" or a "national of a designated enemy country" under the Trading With the Enemy Act (R. 2, 3).

The following specific facts were alleged in the complaint: Respondent was born in Japan in 1892 and is a Japanese citizen (R. 2, 16). In 1914 she was married in Japan to Shinsaku Nagano, a native-born citizen of Japan who had been ad-

[1] By Executive Order No. 9788, October 14, 1946, 11 F. R. 11981, the authority, rights, privileges and powers of the Alien Property Custodian were transferred to the Attorney General. The term "Custodian" will be used to indicate either official, as the context may require. The complaint was originally brought against Tom C. Clark, Attorney General. J. Howard McGrath, Attorney General, was substituted as defendant on December 22, 1949 (R. 33).

mitted to the United States for permanent residence in 1906 (R. 2, 5). A daughter was born to them in Japan in 1914 (R. 5). The following year, respondent was admitted to the United States for permanent residence (R. 5, 6), but the daughter was left in Japan in the care of respondent's mother (R. 6). In 1916, a son was born in Chicago (R. 6). In 1919 the Naganos and their son went to Japan and, while there, a second daughter was born (R. 6). Both daughters remained in Japan with respondent's mother while the parents and son returned to this country (R. 6). In 1923 (R. 19) or 1924, the respondent, with her husband and son, again visited Japan (R. 6). This time, however, she remained in Japan, together with the daughters and the son, when the father returned to the United States (R. 6). Aside from a nine months' visit to the United States beginning in September 1932 (R. 7, 30-31, 49), respondent was in Japan with her children from 1923 or 1924 until 1950, when she again entered the United States (R. 49).[2] Her husband visited her in Japan

[2] In exclusion proceedings conducted by the Immigration and Naturalization Service, respondent testified that she had visited the United States from September 20, 1929, to April 1930 (R. 49). This visit "cannot be verified" by the Immigration Service (R. 49) and the complaint contains no allegation of such visit.

These proceedings resulted in the entry by the Assistant Commissioner, Adjudications Division, of an order, dated August 19, 1950, permitting respondent to reenter the United States as a "returning resident." The Assistant Commis-

for several months each year after 1924, except for the period 1932-1933 and during the war (R. 7). Respondent's purposes in going to Japan in 1924 and remaining there were to provide a Japanese education for the son, then aged eight, and to make arrangements in Japan for the marriages of the daughters, then aged ten and four (R. 6).

Petitioner moved to dismiss the complaint for failure to state a claim (R. 28). The District Court granted the motion and dismissed the action. The court held that, even though respondent's legal domicile may have remained in the United States, she was a person "resident within" Japan during the war under § 2(a) of the Trading With the Enemy Act, and therefore an enemy ineligible to bring suit under § 9(a) of the Act. Rejecting "the alleged family necessity relied on by [respondent] as an explanation for her long stay in Japan," the court held that "the facts alleged by [respondent] show that her residence in Japan was deliberate, whatever its motivation" (R. 35). The District Court relied solely on § 2(a), and rejected the Government's alternative contention that § 39, prohibiting returns to nationals of Japan, was also a bar to recovery (R. 33-38).

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sioner held that the evidence before him supported the conclusion that respondent was then returning from a temporary visit abroad and that she had never voluntarily relinquished her domicile in the United States (R. 49-51).

The Court of Appeals for the Seventh Circuit reversed, holding (1) that respondent was not "resident within" Japan inasmuch as, on the facts alleged, she had never intended to abandon her "permanent residence" in the United States; and (2) that § 39 did not bar respondent's recovery (R. 54-65).[3]

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that § 39 of the Trading With the Enemy Act did not bar respondent's suit.

2. In holding that respondent was not an "enemy" for purposes of § 9(a) of the Trading With the Enemy Act.

3. In reversing the judgment of the District Court.

[3] Shinsaku Nagano, the husband of respondent and a citizen of Japan, brought a companion suit under § 9(a) to recover, as his own property, 3,105 of the 8,780 vested shares. The court below, reversing the District Court, held the husband entitled to the 3,105 shares and directed the entry of judgment for him for the recovery of those shares. *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753 (C. A. 7). The court did not pass on the applicability of § 39 as a bar to the husband's recovery. No review of that decision has been sought. The husband, as a citizen of Japan who was not present there during the war but was in the United States, is presumably eligible for an administrative return of his property under § 32(a)(2)(D) of the Act (60 Stat. 50, 50 U. S. C. App. 32).

SUMMARY OF ARGUMENT

I

On its face, § 39 of the Trading With the Enemy Act clearly bars the present suit for return of vested property. It applies to all property vested after December 17, 1941, and imposes a flat prohibition against the return of any such property to nationals of Germany or Japan. This prohibition is subject to only one exception, not here applicable, permitting administrative return under § 32 of the Act.

As so construed, § 39 is consistent with, and implements, the scheme of the Act as a whole. Section 32, adopted in 1946, permits administrative returns, when found to be in the interest of the United States, to nationals of Germany and Japan who were not present in enemy territory during the war. Respondent, having been so present, is not eligible for such a return. To permit her to recover under § 9(a) would be to give her as a matter of right what she could not obtain as a matter of grace under § 32.

Section 39, as thus construed, is also consistent with the prior historical development of the Act. After World War I, the Treaty of Berlin, by the incorporation of certain provisions of the Treaty of Versailles, recognized the right of the United States to retain the seized assets of German nationals, wherever resident, as security for American war claims, and the obligation of the German

Government to compensate its nationals in respect of such assets. This policy of holding vested property as security for American war claims, although departed from in the Settlement of War Claims Act of 1928, was reinstated by the Harrison resolution of 1934. The War Claims Act of 1948, of which § 39 is a part, adopts the same policy. In thus providing for the retention of vested German and Japanese property as a fund out of which to pay American war claimants, Congress recognized that its prohibition of return to "nationals" of those countries might result in a denial of return to German and Japanese citizens resident outside the enemy countries. The Senate Committee refused to adopt amendments presented to it to change that result.

Respondent is a "national" of Japan in every sense of the word: she is a "national * * * of a foreign country [Japan]" within Executive Order No. 8389, as amended, dealing with "freezing" of foreign funds; for purposes of the vesting of property under Executive Order No. 9193 she is a "national of a designated enemy country [Japan]" as a Japanese citizen who was "within" Japan during the war; and she is a "national" of Japan as that term is normally used in statutory and international law. She is thus within the bar of § 39.

II

Respondent was also barred from maintaining suit under § 9(a) as a person "resident within" Japan during the war and hence an "enemy" under § 2. While the words "resident within" in § 2 are ambiguous, the legislative history of the section discloses that Congress intended to include persons living in enemy countries for other than transitory purposes, and to exclude only persons under constraint and transients. To read the definition of "enemy" in § 2 as including persons who, though not domiciled there, were voluntarily living in enemy territory for other than merely temporary purposes accords more nearly with the scheme of both the seizure provisions of the Act, which were drawn on the premise that the presence of the owner within enemy territory put his American property within the reach of the enemy government, and of the related sections of the Act prohibiting trade with an "enemy" during war time.

In any event, the 1941 amendments to § 5 (b) of the Act, the Executive Orders issued thereunder, and the provisions of § 32, added in 1946, authorized vesting of property of, and denied administrative return to, an enemy citizen who was present in enemy territory during the war. In order to give effect to those amendments, such a citizen, so present, should now be deemed an "enemy" for all purposes under the Act. Cf. *Clark* v. *Uebersee Finanz-Korp., A.G.*, 332 U.S. 480, 488.

ARGUMENT

I

Section 39 of the Trading With the Enemy Act Prohibits Recovery Under Section 9(a) of the Act by Respondent

A. *The terms of Section 39, as well as the present structure of the Act, bar the recovery of vested property by a national of Japan under Section 9 (a)*

The Court of Appeals for the Seventh Circuit recognized in the instant case (R. 60) that:

> . . . if Section 39 is to be taken at its literal face value, it is the law that a citizen of Japan is a national of that nation and that as such plaintiff may not recover her property even though Section 9(a) giving her right of action has not been expressly repealed.

Similarly, the Court of Appeals for the District of Columbia Circuit in *Guessefeldt* v. *McGrath*, (Guessefeldt record 25), No. 204 this Term, said: "the statute is quite specific."

The relevant language of § 39 (set out in full at Appendix, p. 64, *infra*) is:

> No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof * * *. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act * * *.

This is a flat, unqualified prohibition of return of vested property to German or Japanese nationals. The prohibition applies by its terms to all German and Japanese property vested during World War II; Section 39 says "no property * * * vested * * * at any time after December 17, 1941[4] * * * shall be returned * * *."[5] To this prohibition only one exception, not here applicable (see, *infra*, pp. 12-13), is made; notwithstanding § 39, return may be made under § 32 of the Act. This serves to emphasize that return by any procedure other than that of § 32 is prohibited. It would be hard to draft language which more clearly precludes returns to persons who, like respondent (see *infra*, pp. 32-37), are "nationals" of Germany or Japan.

The same result follows when we read § 39 with the rest of the Act, as we are bound to do, as parts of "an integrated whole". *Markham* v. *Cabell*, 326 U. S. 404, 411. The whole of the Act must be read to give it "the most harmonious, comprehensive meaning possible." *Clark* v. *Uebersee Finanz-Korp., A. G.*, 332 U. S. 480, 488.

[4] On December 18, 1941, the First War Powers Act amended § 5(b) of the Trading With the Enemy Act to confer power to vest property of foreign "nationals". See *infra*, pp. 20-21. It is under § 5(b) as so amended, and Executive Orders 9095 and 9193 issued pursuant thereto, that World War II seizures were made, including the vesting in this case (R. 10-11).

[5] The phraseology of the section makes it clear that it precludes any return after the date of its enactment, regardless of when the claim or suit may have been filed.

Section 9(a) is one of two "return" provisions in the Act, the other being § 32, which was enacted in 1946. Like § 39, section 32 deals with all World War II vestings; it applies to "any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to Dec. 18, 1941)." As to returns, § 32 is more liberal than § 9(a). Under § 9(a) an "enemy" may not receive an administrative return or maintain a suit for return, while under § 32 discretionary administrative returns may be made to certain classes of persons who are technically "enemies" as that term is defined in the Act. Return under § 32 may, however, be made only on an administrative finding that the return "is in the interest of the United States" (§ 32(a)(5), *infra*, p. 64) and action under it is not subject to judicial review, the claimant being confined to his more limited right to judicial relief under § 9(a). *McGrath* v. *Zander*, 177 F. 2d 649, 651-2 (C. A. D. C.); *Feyerabend* v. *McGrath*, 189 F. 2d 694 (C. A. D. C.). Typical of the returns made under § 32 are those to Frenchmen and Belgians, who were technically enemies as residents of territory occupied by the enemy (§ 2), and to Germans who were persecuted by their own country on political, racial or religious grounds. Section 32(a)(2)(C) and (D), *infra*, p. 63.

Under § 32 the Custodian is prohibited from re-

turning the property in suit to respondent, for one class of claimants to whom returns are prohibited by that section is:

> an individual who was at any time after December 7, 1941, a citizen or subject of [Germany, Japan] . . . and who on or after December 7, 1941, and prior to the date of the enactment of this section, was present . . . in the territory of such nation . . . [§ 32(a)(2)(D)].

On the allegations of the complaint and the admitted facts, respondent was a citizen of Japan and present in the territory of Japan from December 7, 1941, to her entry into the United States in 1950 (R. 6-7, 16), whether or not she was an "enemy" under § 2 as "resident within" Japan. Thus, she is not eligible for a discretionary administrative return under § 32. To hold that she still may secure a return of the property under § 9(a) as a matter of right would be at least anomalous.

The interrelation between §§ 9(a), 32, and 39 is also illustrated by the situation of plaintiff's husband. On the literal language of § 39 he, too, would be barred from recovery under § 9(a) as a citizen and therefore a "national" of Japan. But from December 7, 1941, to the enactment of § 32 in 1946 he was in the United States and was not "present" in Japan, and accordingly would appear to be eligible for a return under § 32.[6]

[6] The Seventh Circuit held that he was entitled to recover as not a § 2 "enemy" but did not mention § 39. *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753. The Government did not petition for certiorari. See n. 3, p. 6, *supra*.

The net result is that citizens of Germany and Japan may not recover vested property under § 9(a), but that they may obtain returns under § 32 as a matter of administrative discretion if they were not in German or Japanese territory during the period 1941-1946, and if the Attorney General finds that such action is in the interest of the United States. This result preserves the preferred position which Congress gave in § 32 to citizens of Germany and Japan who were not present in enemy territory during the war, and to persecuted persons. The result appears to be reasonable and consistent, "harmonious, comprehensive"; it permits each section to "fulfill its mission". Cf. *Clark* v. *Uebersee Finanz-Korp., A. G.*, 332 U. S. 480, 488-489. On the other hand, if § 39 is held not to apply to suits under § 9(a), then the emphatic opening words of § 39—"No property * * * shall be returned"—have no meaning at all, except possibly as a precatory declaration of future Congressional policy.

In *Guessefeldt* v. *McGrath*, No. 204 this Term, the Court of Appeals for the District of Columbia Circuit reached the result that we believe the language and the scheme of the Act require, and held that a citizen of Germany was barred from recovery under § 9(a) by § 39, although on the pleadings in that case he had not been "resident within" Germany and so was not an "enemy" within § 2 of the Act. It said (*Guessefeldt* record 25-6):

> The issue before us then is simply this, has Section 39 of the Act, which prohibits return of World War II vested property to a national of Germany, prevented recovery of such property by a German citizen. We must conclude that the present law precludes a recovery. Although we can sympathize with the situation in which the appellant finds himself, the statute is quite specific. Concededly the appellant is and always has been a German citizen, and a citizen is necessarily a national of the country of which he is a citizen (here Germany) * * *. Consequently, Section 39 operates as a complete bar to the appellant's suit.

B. *The history of the Act supports the conclusion that Section 39 bars recovery by a national of Japan.*

The court below felt constrained by the presumption against implied repeals to hold that § 39 had not revoked the right of nationals of Germany and Japan to recover under § 9(a) (R. 62). As to that, the Court of Appeals for the District of Columbia Circuit disagreed in the *Guessefeldt* case, No. 204 this Term, saying (*Guessefeldt* record 26):

> If Congress had intended to completely repeal Section 9(a) it would have so declared. So far, however, as Section 39 is in irreconcilable conflict with Section 9(a), it must be deemed to have superseded Section 9(a).

There is no question here of the complete repeal of § 9(a) by § 39. The later section merely abrogated the right of nationals of Germany and of Japan to recover by suit. Other foreign nationals and citizens of the United States, who are not

"enemies" within the Act, may still sue and recover under § 9(a). As to nationals of Germany and Japan, however, the command of § 39 that "no property" of such nationals "shall be returned" is plainly inconsistent with the "right to sue for return" (R. 59) conferred by § 9(a). Since Congress, while expressly saving rights under § 32, did not include § 9(a) in the saving provision, the rights formerly available under § 9(a) are *pro tanto* superseded by the later enactment.

The abrogation of the right of German and Japanese nationals to recover vested property was, moreover, a logical step in the development of the Act since 1917, as well as a step consistent with the 1946 amendments embodied in §§ 32 and 34.

1. *The World War I Act and Amendments.*— Under the 1917 Act property believed to be "enemy" owned was subject to seizure. "Enemy" included a person of any nationality "resident within" enemy territory, but it did not include citizens of Germany resident in the United States or in neutral countries unless they were "proclaimed" as "enemy" by the President. So the ordinary German not resident in Germany was entitled to recover his property under § 9(a). *Stadtmuller* v. *Miller,* 11 F. 2d 732 (C. A. 2); *Vowinckel* v. *First Federal Trust Co.,* 10 F. 2d 19 (C. A. 9).

In 1921 Congress passed Public Resolution No. 8 (42 Stat. 105), which declared an end to the war

and which also provided (§ 5) that all property of Germany and of all German nationals which had come into the possession of the United States or been made the subject of a "demand" (the World War I instrument of seizure) should be retained by the United States until Germany had made provision for the satisfaction of all claims against it by persons owing "permanent allegiance" to the United States who had suffered loss or damage through the acts of Germany or its agents. The substance of this Resolution was incorporated into the Treaty of Berlin, which was proclaimed on Nov. 14, 1921 (42 Stat. 1939). That treaty (Arts. I and II) also incorporated certain provisions of the Treaty of Versailles, including those of Arts. 297 and 298 and the Annex thereto,[7] by which, *inter alia*, the Allied and Associated Powers reserved the right to retain and liquidate all property of German nationals (Art. 297(b)), and Germany undertook to compensate her nationals for such retention of their property (Art. 297(i)) and agreed that "no claim or action" should be brought "by any German national, wherever resident", against any Allied or Associated Power or against any person "in respect of any act * * * with regard to his property" under "ex-

[7] These provisions formed part of Part X of the Treaty of Versailles, expressly incorporated by Art. II of the Treaty of Berlin.

ceptional war measures" (Annex, par. 2).[8] In *Klein* v. *Palmer*, 18 F. 2d 932 (C. A. 2), one of the plaintiffs was a citizen of Germany resident in the United States during the war who had not been proclaimed an enemy; he sued the Alien Property Custodian and a purchaser from him for the return of property seized under the Act and for damages. The court held that recovery was barred by these provisions of the Treaty. For other cases broadly applying these provisions of the Treaty, see *United States* v. *Chemical Foundation*, 272 U. S. 1, 11; *Munich Reinsurance Co.* v. *First Reinsurance Co.*, 6 F. 2d 742, 747-9 (C. A. 2); *Junkers* v. *Chemical Foundation*, 287 Fed. 597 (S. D. N. Y.); *Lange* v. *Wingrave*, 295 Fed. 565 (E. D. La.).[9]

The plan of holding seized property of German nationals as security for the performance by Germany of its obligations was followed in the main until 1928,[10] when the Settlement of War Claims

[8] For full text of the Versailles Treaty, see Sen. Doc. 348, 67th Cong., 4th sess., vol. III, pp. 3329-3522. Most of the provisions relevant for present purposes are set out in *Klein* v. *Palmer*, 18 F. 2d 932 (C. A. 2).

[9] The Treaty seems to have been overlooked in the *Stadtmuller* and *Vowinckel* cases (*supra*, p. 16). Vowinckel may not have been within the Treaty by reason of his preferred status under the Geneva Convention, as a Red Cross surgeon. See the opinions in his case, 10 F. 2d 19 (C. A. 9) and 15 F. 2d 872 (N. D. Calif.).

[10] There were a number of exceptions. For example, the Winslow Act in 1923 (42 Stat. 1511) permitted the return of not over $10,000 each to individual German claimants. Trad-

Act (45 Stat. 254) authorized the return of 80 per cent of the seized property upon the filing by the claimant of a consent to the postponement of the return of the remaining 20 per cent. Trading With the Enemy Act, §§ 9(b)(14) and (16), 9(m). This Act contemplated that American war claims would be paid out of a fund to be built up by the payment by Germany of awards of a Mixed Claims Commission. See, *Z & F Assets Corp.* v. *Hull*, 311 U. S. 470. Thus, in effect, that fund was substituted for the seized property as the security for American claimants.

Under these provisions returns to German citizens were made by administrative action or suit, § 9(c)—*i.e.*, by the same procedures as under § 9(a). Such returns of German property under § 9(b) of the Trading With the Enemy Act continued until 1934 when the Harrison Resolution (48 Stat. 1267, Appendix, p. 66, *infra*), postponed further returns as long as Germany continued in default on her obligations to pay such awards. This Resolution had the effect of cutting off the right of German nationals to recover under § 9(b). *Cummings* v. *Deutsche Bank*, 300 U. S. 115.

2. *World War II amendments.*—Germany never did pay up the arrears, and in 1939 World War II

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ing With the Enemy Act, § 9(b)(9). The history of the Act is traced in the concurring opinion in *Markham* v. *Cabell*, 326 U. S. 404, 413.

started in Europe. In the interval between the two wars Germany and other nations had developed and extended the techniques of economic warfare, and these, even before the United States became involved in the shooting war, were considered a threat to our economy and national interest. See, *Clark v. Uebersee Finanz-Korp., A. G.*, 332 U. S. 480, 484-486; United States Treasury Department, *Administration of the Wartime Financial and Property Controls of the United States Government* (1942), pp. 29-31.

The first counter-measure by the United States was the "freezing" of the assets here of Norway and Denmark and their "nationals" following the invasion of those countries in April of 1940. As the war in Europe spread, the controls were extended to cover all of continental Europe and parts of Asia, including Germany and Japan. Executive Order No. 8389, as amended by Executive Orders 8785 (June 14, 1941, 6 F. R. 2897) and 8832 (July 26, 1941, 6 F. R. 3715). "National" was defined in the Order as including "subject, citizen or resident." Sec. 5E(i). This definition was ratified by Congress by the Joint Resolution of May 7, 1940 (54 Stat. 179), and again on Dec. 18, 1941, by the First War Powers Act (§ 302, 55 Stat. 838, 840).

The First War Powers Act also gave the President authority to vest the property of "any foreign country or a national thereof". For purposes of vesting, the President reaffirmed the definition of

"national" promulgated in connection with the "freezing" program. Executive Order 9193 (July 6, 1942, 7 F. R. 5205) authorized vesting of certain types of property of nationals of foreign countries (patents and copyrights, ships, and corporate property as to which certain special determinations had been made) (§ 2(b), (d), (e)). As to other property it authorized vesting if the property was found to be that of a "national of a designated enemy country" (§ 2(a), (c), (f)). "National of a designated enemy country" was defined as including anyone who was a "national" of such country for freezing purposes but with the proviso that a person otherwise a "national" but not "within" a designated enemy country was not to be deemed a national of a designated enemy country unless the Alien Property Custodian made special findings, such as that the national interest required that he be so treated (§ 10(a)).[11] Thus, the order expressly authorized the vesting of property of persons who, like respondent, were citizens of the enemy country and actually present within that country during the war.

[11] Such a finding was made as to Mrs. Nagano. Vesting Order No. 813 (R. 10-11). In any event, Mrs. Nagano was "within" Japan, whether she be considered to have been "resident within" that country or not.

In accordance with the policy laid down in Executive Order 9193, it has not been the practice of the Custodian to vest the property of citizens of Germany and Japan who were present in the United States during the war unless there was reason to believe that they had acted for the enemy. See Annual Report, Office of Alien Property Custodian, 1945, p. 6.

This "logical extension" of the regulatory powers previously granted, by adding the authority to "vest", was designed to enable the President to make affirmative use of foreign-owned property in the interests of the United States and to assure "flexibility of control". S. Rep. 911, 77th Cong., 1st Sess., pp. 2-3; H. Rep. 1507, 77th Cong., 1st Sess., pp. 2-3; *Clark* v. *Uebersee Finanz Korp., A. G.*, 332 U. S. 480, 484; *Silesian-American Corporation* v. *Clark*, 332 U. S. 469, 475-477. The relationship between this expanded vesting power and the right to return conferred by § 9(a) to all persons who were not "enemies" under § 2 was apparently not considered by Congress. This Court dealt with one aspect of that problem in 1947 when it held that, while § 9(a) itself had not been amended, the § 2 definition of "enemy" had been broadened to discard its original territorial character and to reach persons "tainted" by ties to the enemy. The question of the precise degree of enemy affiliation needed to constitute "taint" was left to "await legislative or judicial clarification". *Clark* v. *Uebersee Finanz-Korp., A. G., supra*, at 490.

Even before the *Uebersee* decision, the shooting war had ended, although no treaties of peace had been signed, and Congress had begun to decide on the disposition of the vested property. In 1946 it enacted § 32, allowing discretionary administrative returns to technical but "non-hostile" enemies and, significantly, to citizens of enemy countries who had not been "present" between December 7,

1941, and the enactment of § 32, in the territory of the enemy country or in territory occupied by it. Returns were also allowed to enemy citizens persecuted on political, racial or religious grounds. Section 32(a)(2)(D). In 1946 Congress also enacted § 34, providing for the payment of the debts of the former owners of vested property to citizens of the United States, American corporations, and long-time residents of the United States.[12]

3. *The War Claims Act of 1948.*—In 1947, H. R. 4044 was reported by the House Committee on Interstate and Foreign Commerce. The bill provided for immediate payment of claims of American civilians who had been interned during the war following attack or invasion by Japan, for a subsequent report to Congress by a War Claims Commission of its recommendations with respect to the eventual payment of other war claims, and for the application to payment of such claims of the proceeds of vested property. As reported, and as passed by the House, it postponed payment of debt claims under § 34 until six months after the report of a War Claims Commission to be appointed and, as now, it prohibited the return of property of nationals of Germany or Japan to the

[12] The Court of Appeals in the instant case referred to the refusal of Congress, in adopting these provisions, to adopt a further provision amending § 9(a) (R. 63). The proposed provision would have barred suits under § 9(a) by *all foreign* nationals, and remitted them to a suit for just compensation. S. Rep. No. 1839, 79th Cong., 2d sess. (1946), p. 2. In § 39 Congress did adopt a much more limited provision denying return to German and Japanese nationals.

former owners. The "net proceeds" of vested German and Japanese property were to be covered into the Treasury. See H. Rep. 976, 80th Cong., 1st Sess.

A subcommittee of the Senate Committee on the Judiciary held extensive hearings on this bill. Representatives of creditors and others protested the postponement of the payment of debts, pointing out that the release of German assets under the Settlement of War Claims Act in 1928 had deprived creditors of their security and left many American claims unpaid. See *Hearings before a Sub-committee of the Senate Committee on the Judiciary,* 80th Cong., 2d sess., on H. R. 4044, pp. 5-12, 88-101, 138-148. Representatives of veterans' organizations protested the exclusion from the immediate benefits of the bill of members of the armed forces who had suffered maltreatment in prison camps during the war. Senate *Hearings, passim.* Other witnesses protested the non-return provision of the bill on the specific ground that the prohibition of returns to German and Japanese "nationals" would amount to an extension of the statutory definition of "enemy" to include enemy nationals who lived elsewhere than in enemy or enemy-occupied territory. Senate *Hearings,* pp. 197-198, 233, 235, 255.

The bill, as enacted, significantly followed the pattern set during the Senate hearings. The protests of the creditors were heeded, and the provision for postponement of the payment of debt

claims was dropped. The claims of the veterans were recognized, and members of the armed forces who had suffered maltreatment as prisoners of war were made eligible for benefits. Only the arguments of those who protested the blanket prohibition of returns to German and Japanese nationals were ignored; the principle of non-return of German and Japanese properties was retained, and both German and Japanese nationals were placed in the position in which the Harrison Resolution of 1934 had placed Germans with respect to World War I seizures.

The legislative history, moreover, contains repeated evidence of Congressional awareness that the term "national" would include enemy citizens wherever resident and whatever their personal disposition toward the enemy. Thus, the House Committee Report described the philosophy underlying the provision which became § 39 in the following terms:

> The policy of nonreturn and noncompensation is a sound public policy which should be enacted into law. It does not violate any concepts of international law or international morality. No essential difference exists between private property and public property in the case of Germany and Japan. For several years before World War II while Germany and Japan were preparing to make war upon the United States, property owned in the United States by the *citizens of both of these countries* was subject to rigid control of their respective governments. While the fiction of private ownership was retained, ac-

> tually property of *German and Japanese nationals in the United States* was widely used to accomplish the national objectives of those countries. [H. Rep. 976, 80th Cong., 1st Sess., p. 2. (Emphasis added.)]

At the Senate hearing, the attention of the Committee was even more explicitly called to the consequences of the use of the term "national" in the proposed legislation. One of the witnesses before the Senate Judiciary Subcommittee considering the bill was an attorney from the District of Columbia who described himself as a specialist in international law. Analyzing the proposed § 39 he pointed out:

> Section 2 of the Trading With the Enemy Act defines enemies under territorial principle, not on the basis of nationality. It terms enemies those who live in enemy country or enemy-occupied territory. It follows that the effect of this bill would be an extension of the statutory definition of enemies, so as to encompass enemy nationals who lived elsewhere than in enemy or enemy-occupied territory. [Hearings before a Subcommittee of the Senate Committee on the Judiciary, 80th Cong., 2d Sess., on H. R. 4044, p. 233.]

He listed as those who would fall within the scope of its language "Germans who left Germany possibly long before the war and now live, for instance, in South America or even in this country without having acquired another nationality" (*idem.* p. 234). To which Senator Cooper replied, "is there any reason that their property should be returned

to them any more than a German in Germany?" (*ibid.*). The same witness then submitted a proposal which would have excluded from the prohibition of § 39 German and Japanese nationals who resided outside of enemy or enemy-occupied territory, provided that they did not aid or abet the enemy (*idem.* p. 235). The amendment was not adopted by the Committee.

A second attorney expressing his opposition to the bill before the same subcommittee argued that it was objectionable because it failed to "discriminate between friendly aliens and unfriendly ones" (*idem.* p. 255). He called attention to the fact that "Japanese friendly aliens could not become American citizens" and urged that they should not be barred "because, technically, they are the nationals of Japan and, therefore, enemy aliens" (*ibid.*). He submitted that if the principle of nonreturn were adopted there should be "provision for the return of the property to that class of aliens * * * we designate as friendly * * *" (*ibid.*). No action was taken on his proposed change.

The subcommittee also had before it a statement by the Japanese-American Citizens League Anti-Discrimination Committee (*idem.* pp. 197-198) stressing that "on its face [§ 39] seems to deprive some Japanese aliens in the United States of their property". The League went on to recommend that "appropriate safeguards be written into the law" for the protection of Japanese nationals liv-

ing in this country. And this recommendation also was not adopted.

It seems clear that in enacting the War Claims Act of 1948, which added Section 39 to the Trading With the Enemy Act, Congress deliberately chose to reverse the policy of the Settlement of War Claims Act of 1928 and to adhere to the policy of the Treaty of Berlin and of the Harrison Resolution; that is, of devoting vested property of enemy governments and their nationals, wherever resident, to the payment of American claims. The 1948 Congress, it is clear, was primarily interested in assuring payment to American prisoners of war and other war claimants and it sought to do this by providing as large a war claims fund as was justly possible. And Congress believed it just and fair that German and Japanese assets, both public and private, should be marshalled for the purpose of satisfying these claims of American nationals arising out of Axis depredations. Since property of "nationals" of Germany and Japan had been vested during World War II pursuant to the authority conferred by the Executive Orders issued under § 5(b) of the Act (see p. 21, *supra*) Congress could properly consider such property as enemy property, and permit return of it only on the conditions and subject to the safeguards which Congress had prescribed in § 32 of the Act. The individual enemy nationals affected, the Congress declared, should look to their own governments for

compensation. 94 Cong. Rec. 551, 555, 556, 564. In this connection, Representative Hinshaw, who was in charge of the bill on the House floor, read into the Record a letter from the State Department declaring:

> It will be noted, therefore, that the policy of nonreturn of German and Japanese assets in the United States, as provided in section 1 of H. R. 4044, is in accord with that stipulated in international agreements in relation to external enemy assets concluded by the United States and other countries as a consequence of World War II. Moreover, it is assumed that any peace settlements with Germany and Japan will contain provisions for the nonreturn of German and Japanese assets, as well as provisions requiring Germany and Japan to pay compensation to their respective nationals for such assets. [*Idem.* p. 556.][13]

Representative Wadsworth commented during the debate that it had "become perfectly apparent

[13] The Treaty recently signed with Japan but not yet ratified provides for the retention of vested Japanese property, subject to an exception for:

> property of Japanese natural persons who during the war resided with the permission of the Government concerned in the territory of one of the Allied Powers, other than territory occupied by Japan, except property subjected to restrictions during the war and not released from such restrictions as of the date of the first coming into force of the present Treaty. [*Department of State Bulletin*, Vol. XXV, Aug. 27, 1951, p. 351.]

This exception would appear to offer no aid to the respondent, since her property was "restricted," *i.e.*, vested, and she resided in Japan during the war.

* * * that war today is total war and that the people of a country that goes to war under the government of that country must share the responsibility for what happens" (*idem.* p. 551). And Representative Dolliver declared that "if there is a Japanese national whose property is taken from him by the United States in the exigencies of war, then the duty to compensate that Japanese national rests not with us but with the Japanese Government" (*idem.* p. 564). And, when the bill came to the floor of the House, Congressman Cox, recognizing that the criterion of nationality left no room for distinguishing between the friendly and the unfriendly enemy national, observed that "many perfectly innocent people will, under the bill, lose their all". 94 Cong. Rec. 551.

Repeal by implication is, like other questions of construction, a matter of legislative intent. *Sutherland on Statutory Construction* (3d ed. 1943) § 2016. The question is to be resolved according to the ordinary rules of construction. *Posadas* v. *National City Bank,* 296 U. S. 497, 504. Particularly in the case of an Act which, like the Trading With the Enemy Act, has been frequently patched but never reconstructed (cf. *Clark* v. *Uebersee Finanz-Korp., A. G.,* 332 U. S. 480, 488-9), there is no reason to apply a presumption against repeal by implication so as to defeat the legislative purpose. It being clear that the dominant purpose of Congress in that part of the War Claims

Act which is § 39 was to cut off returns to German and Japanese nationals, that purpose must prevail even though the result is a cutting down of § 9(a) without express reference to that section. Cf. *United States* v. *Belt*, 319 U. S. 521; *S. E. C.* v. *Joiner Corp.*, 320 U. S. 344, 350.

The language and legislative history of § 39, read in the light of the active history of the Trading With the Enemy Act since 1917, leaves no doubt, we think, that Congress intended to bar the return of the property of German and Japanese nationals and to use the net proceeds, after payment of the debts of former owners to American creditors, for the relief of internees and prisoners of war who had suffered at the hands of Germany and Japan. Returns were still permitted under § 32 to German and Japanese nationals who were not present in the enemy country during the war or who were persecuted by their own governments for their politics, race, or religion. But return by any other procedure, including § 9(a), was cut off.[14]

[14] Even before the decision of the *Guessefeldt* case by the Court of Appeals for the District of Columbia Circuit, the majority of the courts which had considered the question had held that § 39 did operate to bar returns under § 9(a) to nationals of Germany and Japan. *Schill* v. *McGrath*, 89 F. Supp. 339 (S. D. N. Y.); *Lippmann* v. *McGrath*, 94 F. Supp., 1016 (S. D. Ill.); *Bellman* v. *Clark*, Civ. No. 47-229, not reported (S. D. N. Y., Nov. 8, 1948); *Mittler* v. *McGrath*, Civ. No. 3276-48, not reported (D. D. C. March 31, 1950); *Janner* v. *McGrath*, Civ. No. 3685-49, not reported (D. D. C. March 31,

C. *Respondent is a "national" of Japan within Section 39*

Respondent is admittedly a citizen of Japan (R. 2). As such, she is a "national" of Japan according to the definition in Executive Order No. 8389, as amended (*infra*, p. 70), the "freezing" order, which defines "national" to include "a subject, citizen or resident" (§ 5E(i)). That definition was made under the authority of § 5(b) of the Trading With the Enemy Act, as amended, and was twice ratified by Congress (Joint Resolution of May 7, 1940, 54 Stat. 179; First War Powers Act, 1941, 55 Stat. 840). (See *supra*, p. 20.[15]

Also, with respect to the authority to vest property conferred by § 5(b), the respondent is a

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1950). *Contra; Jinsha* v. *McGrath*, 90 F. Supp. 892 (D. (Haw.) and the district court in the instant case, *Nagano* v. *McGrath*, 88 F. Supp. 897 (N. D. Ill.).

[15] The Joint Resolution authorized the President to regulate transactions of "any foreign state or a national or political subdivision thereof, as defined by the President," and further provided that "Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed." Section 301 (3) of the First War Powers Act, 1941, similarly conferred power on the President "to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision." And § 302 of that Act "approved, ratified, and confirmed" "all acts, actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made, or issued by, or pursuant to the direction of, the President or the Secretary of the Treasury" under the Trading With the Enemy Act.

"national of a designated enemy country" within Executive Order No. 9193, July 6, 1942, 7 F. R. 5205 (*infra*, pp. 71-73), which delegated to the Custodian the authority to vest under § 5(b), and which provided in § 10:

> The term "national" shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended: *provided, however*, that persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: . . . (ii) that such person is a citizen or subject of a designated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country.

Respondent is a citizen of Japan, hence a "national" under Executive Order No. 8389, and she was "within" Japan on the effective date of Executive Order No. 9193 (July 6, 1942), whether or not she was "resident within" that country for purposes of § 2 of the Act. Thus Executive Order 9193 expressly authorized the vesting of her property.

By 1948, when § 39 was added, the meaning of "national", as so defined, was well settled under the Trading With the Enemy Act. In using the term "national" in that section, Congress must be taken to have used it with that meaning. The Court of Appeals for the District of Columbia so

held in *Guessefeldt* v. *McGrath* (Guessefeldt record 25-6, 27-8). If Congress had intended that § 39 should apply only to the property of "enemies" as defined in § 2 (as the court below said, "forfeitable enemy property" (R. 64)), it had only to say so.

The Seventh Circuit, however, thought that respondent, as a "permanent resident" of the United States, was not within "the conception of citizenship of a foreign nation which Congress had in mind in defining a national" (R. 64). It also said that respondent was not a "citizen" of Japan "within the meaning of the word and its connotation recognized by judicial decisions", since she "on the averments of her complaint, owed no allegiance to Japan and had no reciprocal rights to protection by it", and "had no right to exercise any of the political or civil privileges of Japan" (R. 64). These statements as to the averments of the complaint are without support in the record, and if the complaint had contained such averments they would have been irrelevant here. The respondent admits her Japanese citizenship (R. 2, 16), and if "national" has any meaning at all, it includes a citizen.

Apart from the definitions adopted for purposes of the Trading With the Enemy Act, the term "national" in ordinary usage includes at a minimum citizens of the country in question. The term

"national" was thus defined in the Nationality Act of 1940 (§ 101, 54 Stat. 1137, 8 U. S. C. 501):

> (a) The term "national" means a person owing permanent allegiance to a state.
> (b) The term "national of the United States" means (1) a citizen of the United States, or (2) a person who, though not a citizen of the United States, owes permanent allegiance to the United States. It does not include an alien.

While "national" is under that act a broader term than citizen [16] and includes some non-citizen nationals,[17] citizens of the United States are necessarily nationals of the United States.[18] Similarly,

[16] See *Brassert* v. *Biddle*, 59 F. Supp. 457, 462 (D. Conn.), affirmed, 148 F. 2d 134 (C. A. 2).

[17] For example, Filipinos had this status before the islands became independent in 1946. See *Cabebe* v. *Acheson*, 84 F. Supp. 639 (D. Haw.).

[18] There is nothing to the contrary in *McGrath* v. *Zander*, 177 F. 2d 649 (C. A. D. C.). Mrs. Zander acquired German citizenship under German law by marriage, without losing her American citizenship. The most that the case can stand for is the proposition that an American citizen does not cease to be deemed a national of the United States under the Act because she acquired a second or "dual" nationality, and because she had been detained against her will in the enemy country during the war. Furthermore, in the *Zander* case the Court of Appeals does not seem to have considered the question of the effect of § 39; in an earlier case the same court held that a plaintiff of dual German and Swiss citizenship was not entitled to recover under § 9(b) of the Act. *Von Zedtwitz* v. *Sutherland*, 26 F. 2d 525 (C. A. D. C.). The present case involves no problem of dual nationality.

under our law persons whose sole citizenship allegiance is to Japan are nationals of Japan.

In international law it is equally well settled that a citizen is a "national". Hyde states that "the citizen of the United States is necessarily also a national of the United States". *International Law, Chiefly as Interpreted and Applied in the United States* (2d ed. 1947) § 342. Moore says that "national character, in legal and diplomatic discussions, usually is denoted by the term 'citizenship'," and that "citizenship is the great source of national character." *Digest of International Law* (1906), Vol III, p. 273. See also, Wharton, *Law Lexicon* (14th ed., 1938), Black, *Law Dictionary* (1933); Bouvier, *Law Dictionary* (3d Revision, 1914). Similarly, both the Treaty of Versailles, *supra*, p. 17, and the recent Treaty with Japan, *supra*, p. 29, n. 13, recognized the use of the term "national" as applicable to citizens wherever resident, and the power of the United States to treat property of such "nationals" as enemy property.

The impact of the opinion of the court of appeals in this case is to reverse the effect of the 1940 and 1941 amendments of the Act, and to cut down the meaning of "national" as used in World War II legislation to the narrow confines of the 1917 definition of "enemy". This, it is clear, may not be done. Compare *Clark* v. *Uebersee Finanz-Korporation, A. G.*, 332 U. S. 480, 488-489.

D. *Section 39 presents no substantial constitutional question*

The court below held that the respondent was, under the averments of the complaint, a friendly alien resident in the United States and as such entitled to constitutional guarantees (R. 61). Resident or not, the respondent was not a "friendly alien" as long as the United States and Japan were at war. A subject of a nation at war with the United States, whether or not resident here, is an enemy at common law. *Techt* v. *Hughes*, 229 N. Y. 222, 128 N. E. 185; *Klein* v. *Palmer*, 18 F. 2d 932, 934 (C. A. 2). Nor does the fact that the respondent returned to the United States in 1950 change her status for purposes of the Trading With the Enemy Act. *Swiss Nat. Ins. Co.* v. *Miller*, 267 U. S. 42.

As a citizen of Japan, respondent, had she been in the United States, would have been subject to the drastic wartime power of the executive under the Alien Enemy Act of 1798 (1 Stat. 577, as amended, 40 Stat. 531, 50 U. S. C. 21) to arrest summarily, to intern, or to deport, in his discretion, all "natives, citizens, denizens and subjects" of an enemy country of the age of fourteen years and up, and she would not have been entitled to judicial review. *Ludecke* v. *Watkins*, 335 U. S. 160. Or, even if actually resident in the United States, she might have been proclaimed by the President to be an "enemy" for purposes of the Trading With the Enemy Act. Section 2(c).

This Court recently reviewed the cases relating to the status of enemy nationals in *Johnson* v. *Eisentrager*, 339 U. S. 763, 772-773. There the Court, speaking through Mr. Justice Jackson, said:

> American doctrine as to effect of war upon the status of nationals of belligerents took permanent shape following our first foreign war. Chancellor Kent, after considering the leading authorities of his time, declared the law to be that "* * * in war, the subjects of each country were enemies to each other, and bound to regard and treat each other as such." *Griswold* v. *Waddington*, 16 Johns. (N. Y.) 438, 480. If this was ever something of a fiction, it is one validated by the actualities of modern total warfare. Conscription, compulsory service and measures to mobilize every human and material resource and to utilize nationals—wherever they may be—in arms, intrigue and sabotage, attest the prophetic realism of what once may have seemed a doctrinaire and artificial principle. With confirmation of recent history, we may reiterate this Court's earlier teaching that in war "every individual of the one nation must acknowledge every individual of the other nation as his own enemy—because the enemy of his country." *The Rapid*, 8 Cranch 155, 161. See also *White* v. *Burnley*, 20 How. 235, 249; *Lamar* v. *Browne*, 92 U. S. 187, 194. And this without regard to his individual sentiments or disposition. *The Benito Estenger*, 176 U. S. 568, 571. The alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, regards him as part of the enemy resources.

It is well settled that the confiscation of the property of an enemy national offends no constitutional limitation. *Cummings* v. *Deutsche Bank*, 300 U. S. 115, 120; *United States* v. *Chemical Foundation*, 272 U. S. 1, 11; *Miller* v. *United States*, 11 Wall. 268, 305; *Brown* v. *United States*, 8 Cr. 110, 122; *Klein* v. *Palmer*, 18 F. 2d 932, 934 (C. A. 2). As this Court said in *Silesian-American Corporation* v. *Clark*, 332 U. S. 469, 475:

> There is no doubt but that under the war power, as heretofore interpreted by this Court, the United States, acting under a statute, may vest in itself the property of a national of an enemy nation.

II

Respondent Was "Resident Within" Japan and Therefore An "Enemy" for the Purpose of Section 9(a) of the Trading With the Enemy Act

Apart from any question of the application of § 39, respondent, as a person "resident within" Japan during the war, was an "enemy" and not entitled to sue under § 9(a). Section 2. The construction of the phrase "resident within" is important in litigation under the Act; it lies at the threshold of many suits under § 9(a) in which an individual is the plaintiff. Nationals of countries other than Germany and Japan, including citizens of the United States, may be "enemies" if "resident within" enemy or enemy-occupied territory. Not only is the property of such persons subject to seizure, but trade with an "enemy" as defined

in § 2 is forbidden by the Act. Sections 3, 7. See also §§ 8, 9(a), 12 and 14.

The Trading With the Enemy Act as adopted in 1917 authorized the President to seize "enemy" property (§ 7(c)). "Enemy" was defined primarily in terms of residence, specifically "any individual * * * of any nationality, resident within the territory * * * of any nation with which the United States is at war * * *" (§ 2(a)). The Act also provided a judicial remedy to any former owner of seized property who could establish that he was not a statutory enemy. Section 9(a); *Stoehr* v. *Wallace*, 255 U. S. 239; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51. While the effect of the amendment by the First War Powers Act of 1941 to § 5(b) of the Trading With the Enemy Act (55 Stat. 838, 50 U. S. C. App. 5(b)) has been to broaden the § 2 definition of "enemy" and so to widen the class of persons disqualified from suit under § 9(a) (*Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480), one "resident within" enemy territory remains, as originally, an "enemy."

Respondent, who was born in Japan in 1892, was admitted to the Unites States for permanent residence in 1915 (R. 2, 5-6). After a brief trip to Japan in 1919, she again returned there and together with her children lived there continuously from 1924 until 1950, except for a nine-months' visit to the United States in the early 1930's (R.

6-7).[19] There is no suggestion that respondent was compelled by imprisonment, by illness, or by any other incapacity to remain in Japan. The facts (as distinguished from legal conclusions) stated in the complaint show that she decided in 1924 to remain in Japan long enough to provide a Japanese education for her son, then aged eight, and Japanese marriages for her daughters, then aged four and ten (R. 6). The question is whether on these facts respondent was "resident within" Japan under § 2(a) of the Act and therefore an enemy ineligible to bring suit under § 9(a).

The court of appeals, apparently equating "resident within" to "domiciled", held that respondent was not "resident within" Japan since, on her allegations in the complaint, during the period 1915-1924, she established a "permanent residence" in the United States to which she intended to return (R. 58). This holding, we submit, overlooks the legislative history and misconceives the purpose of the Act. In our view, the Act clearly contemplates that one who is present in enemy territory during war (other than a person under constraint, such as a prisoner of war) is a resident of that territory and hence an enemy unless he went into that territory as a mere transient or sojourner. It is enough if he went to that territory for a purpose the accomplishment of which will

[19] According to the Assistant Commissioner of Immigration, respondent also claimed an unverified visit in 1929 (R. 49). See fn. 2, *supra*, p. 4.

require an extended stay, or a stay of indefinite duration.

As a matter of statutory usage, "resident" may or may not mean "domiciled". "The definition varies with the statute". *McGrath* v. *Kristensen*, 340 U. S. 162, 175. See Kenman, *Residence and Domicile* (1934), pp. 22-27. In the Trading With the Enemy Act, the language of § 2(a) itself indicates that "resident" was not intended to mean "domicile". The word "resident" is used in a manner which plainly suggests location, rather than status, for the statute speaks of individuals "resident within", with implications of place, rather than "resident of", implying legal relationship.

The legislative history supports the view that the technical concept of "domicile", with its connotations derived from use in divorce, venue, and election statutes, was deliberately avoided by the Congress which enacted § 2. In reply to a question from the floor whether "resident" means "having acquired what we know as a legal residence, a domicile," Mr. Montague, the Chairman of the Committee on Interstate and Foreign Commerce, which handled the bill, stated (55 Cong. Rec. 4922, 65th Cong., 1st Sess.):

> No, it does not. The word "residence" is much broader than the word "domicile". Domicile would give you perhaps the idea of permanency, or a legal habitat, but the word "resident" means a sojourner staying or re-

> siding in. It embraces domicile and is broader than domicile.

That "resident within" was used in a geographical sense is further shown by the explanation offered by another member of the committee (*idem.*, at p. 4850):

> Mr. DeWalt: * * * the enemy * * * is not described in terms of nativity * * * or in terms of citizenship, but *he is described in terms of locality.*
>
> What do I mean by that? The enemy is a party who *lives in* enemy territory * * *. * * * the enemy description is a *local* description. * * * this bill * * * does not in any way affect anyone who is a resident of Germany * * * now living in the United States, nor does it affect in any way a party who is * * * a resident of Austria and who is now temporarily here. [Emphasis supplied.]

Indeed, the term "resident within" was considered of such broad sweep that a question arose whether clarification was necessary in order to eliminate from its scope American soldiers held prisoner in enemy territory. *Id.* p. 4922.

In terms of the objectives and scheme of the Act, a construction of "resident" to mean "domicile" is clearly not warranted. The definition of "enemy" in § 2 is framed on the hypothesis that the presence of the owner behind the enemy's lines puts his American property within the power of the enemy government. Accordingly, the owner, regardless of citizenship or personal sympathies,

is classed as an "enemy". *Kahn* v. *Garvan*, 263 Fed. 909, 915 (S. D. N. Y.). To weaken the enemy and to strengthen the United States, his property is made subject to seizure, and he may not recover it under § 9(a). See *United States* v. *Chemical Foundation*, 272 U. S. 1. Under this statutory scheme, what matters is whether the individual has placed himself within the enemy's territory and within his power; his intention to retain a domicile in the United States is immaterial.[20]

Moreover, it should be emphasized that the same definition of "enemy" is made applicable by the Act not only to the power of seizure but also to the prohibitions against trading with the enemy. It would seem hardly to require argument that the trade which was intended to be prohibited was trade with any person physically within enemy territory and hence subject to the enemy's power. Only by a flat prohibition against trade with all such persons could the Act's objective of prevent-

[20] It may be that a construction of "resident within" which embraces a mere transient or one involuntarily detained in enemy territory furthers the objectives of the Act no less than a construction which includes one remaining for more than transitory purposes. Congress, however, apparently meant to compromise between the exigencies and the hardships of war. The legislative history suggests that those under constraint were not intended to be included. See 55 Cong. Rec. 4922. But it does not follow that persons domiciled elsewhere were not to be included. The legislative history, discussed *supra*, shows quite the contrary.

ing any strengthening of the enemy's sinews of war be effectuated.[21]

Although many cases have arisen under the Trading With the Enemy Act which involved persons within enemy territory, none concerned a person precisely in respondent's situation. In a number of cases arising under sections of the Act other than § 9(a), the courts have held persons "resident within" enemy territory, without any reference to the question of domicile. See, *United States* v. *Krepper*, 159 F. 2d 958, 966 (C. A. 3), certiorari denied, 330 U. S. 824; *Faber* v. *United States*, 10 F. Supp. 602, 605 (Ct. Cls.), certiorari denied, 296 U. S. 596; *Kahn* v. *Garvan*, 263 Fed. 909, 915 (S. D. N. Y.); *Miller* v. *Paul*, 237 Ill. App. 166, 168, 173; *Wirtele* v. *Grand Lodge*, 111 Neb. 302, 304-305, 196 N. W. 510, 511; *Noble* v. *Great American Insurance Co.*, 250 App. Div. 773, 77, 194 N. Y. S. 60, 64, affirmed, 235 N. Y. 589, 139 N. E. 746; *Gregg's Estate*, 266 Pa. 189, 192-193, 109 Atl. 777, 778, certiorari denied, 252 U. S. 588. In several suits under § 9(a), the facts established that the claimant either was detained against his will or was a

[21] It should be noted that while in World War II trade with the enemy was prevented primarily by freezing controls, the provisions of § 3 prohibiting trade with the enemy were regarded as a central feature of the Act as adopted in 1917 and as administered during World War I. Even during World War II those provisions have remained as an alternative source of authority to control transactions involving enemy property or interests.

mere transient and in such circumstances he was held not to be an enemy. See, *McGrath* v. *Zander*, 177 F. 2d 649 (C. A. D. C.); *Stadtmuller* v. *Miller*, 11 F. 2d 732 (C. A. 2); *Vowinckel* v. *First Federal Trust Co.*, 10 F. 2d 19 (C. A. 9); 15 F. 2d 872 (N. D. Cal.); *Sarthou* v. *Clark*, 78 F. Supp. 139 (S. D. Calif.); cf. *Josephberg* v. *Markham*, 152 F. 2d 644 (C. A. 2). These cases are clearly distinguishable on their facts from the present case.

In *McGrath* v. *Zander*, the claimant was an American citizen who went to Germany on a visit in June 1939, with return passage booked for September 9, 1939. Her return to the United States was admittedly prevented by the outbreak of hostilies on September 1, 1939, when sailings were cancelled. In these circumstances the court found that the claimant "became an unwilling sojourner" (177 F. 2d at 653). In *Josephberg* v. *Markham*, the claimant had become insane by 1931; while insane he had, on his doctor's advice, gone to Italy for treatment. The court held, over a sharp dissent, that his presence in Italy "for reasons beyond his control," a presence which was "not attributable as a matter of law to his volition" (156 F. 2d at 649), did not render him a resident of Italy within the meaning of the Act. The *Vowinckel* case involved a claimant who in 1915 had gone to Germany as a surgeon in the German Red Cross; the decisions rested in considerable part on the humanitarian purpose of his presence in Ger-

many and on the specific protections accorded to members of the Red Cross by the Geneva Convention. In the *Stadtmuller* case, the claimant alleged that in 1917 he had upon "the urgent advice of his doctors" left for Germany to settle the estate of his parents and for a rest and medical care, "with the intention of returning to this country 'as soon as possible' " (11 F. 2d at 732), and that while in Germany he was prevented by the outbreak of war from leaving that country to go to Switzerland as he had intended. In the *Sarthou* case, the asserted enemy, having lived in the United States since 1887, went to Germany in October 1940, and remained there until his imprisonment by German authorities in 1942 and death in 1944.

Respondent's position is totally different from that of any of these claimants. Stadtmuller, Zander and the asserted enemy in *Sarthou* could be deemed transient sojourners, caught in enemy territory by the outbreak of the war. Vowinckel was in enemy territory for a special humantarian purpose protected by an international convention. The claimant in *Josephberg* was an incompetent, incapable in law of having any intention. Respondent, on the other hand, had voluntarily made her home in Japan for a purpose which required many years to accomplish. She seeks to bring herself into the same category as a transient or sojourner by allegations that in 1924 she decided to remain in Japan only long enough to provide her

children with a Japanese education and to arrange for the marriage of her daughters, and that these family obligations prevented her return to the United States. Such obligations quite clearly do not constitute the kind of compulsion which the courts will recognize. See Goodrich, *Conflict of Laws* (2d Ed., 1938), p. 45.[22] Nor do these allegations provide any support for the position that respondent was a mere transient. It is apparent, particularly since the children then ranged in age between four and ten, that their education and marriage would require a prolonged and indefinite stay in Japan. In these circumstances, respondent's stay was hardly involuntary and clearly not transitory.

While the present case is thus clearly distinguishable on its facts, we do not deny that the language of the *Stadtmuller* and *Vowinckel* cases appears to adopt the test of "domicile" in its strict sense as the applicable test under § 2(a).[23] The

[22] It may be that the Immigration Act of 1924 (43 Stat. 153, 8 U. S. C. 201 *et seq.*), which prevented respondent's daughters from coming to this country for permanent residence, reinforced respondent's decision to remain in Japan for the purposes of educating them and of arranging marriages there. This circumstance, however, while explaining respondent's motive, did not render her stay legally involuntary. *Cf.* Restatement, *Conflict of Laws* (1934 ed.), § 21e.

[23] In *Zander* (177 F. 2d at 652) the court quoted with approval the statement in *Sarthou* v. *Clark*, 79 F. Supp. 139 (S. D. Calif.) that "resident within" means a "habitation having domiciliary properties." We take this to mean no more than that the stay in enemy territory must be voluntary and for other than transitory purposes.

opinions in those cases make no reference to the discussions in Congress accompanying the adoption of the Trading With the Enemy Act in 1917 which (as we have shown *supra*, pp. 42-43), clearly indicate that the Congress had no such intention.[24] To the extent that they adopt a test of domicile we believe that they are wrong and fail to give effect to the Act's purposes. The error is not one which had occasion to become settled in the administration of the Act after World War I, for with the progressive amendments to § 9(b) of the Act, the definition of residence, as applicable in a suit under § 9(a), lost its importance. Under § 9(b), American and neutral citizens, wherever resident, could recover their entire property, and enemy citizens, wherever resident, could recover 80% of their property. For this reason, while returns were made under § 9(b), the question of residence in enemy territory as affecting the right to return under § 9(a) was not litigated in any other reported case following World War I. The impor-

[24] The reasoning of these cases rests in part on an uncritical carrying over of the reasoning in *Miller* v. *Sinjen*, 289 Fed. 388 (C. A. 8). That case was a suit under § 9(b) of the Act, allowing recovery by United States citizens wherever resident. It dealt with the concept of residence necessary to work an expatriation under the nationality laws; it in no way involved the concept of residence under § 2(a) of the Trading With the Enemy Act.

tance of that question did not revive until after World War II.[25]

In other federal statutes the word "resident" has also been held to embrace an individual who voluntarily remains in a given place for more than transitory purposes. Indeed, dire consequences may attach to one so situated. It may entail loss of citizenship, *Savorgnan* v. *United States*, 338 U. S. 491, or subject one to enforced military service, *United States* v. *Rubinstein*, 166 F. 2d 249, 254 (C. A. 2), certiorari denied, 333 U. S. 868. The intention to go somewhere else at some indefinite future date is not material. What is material is the fact of remaining (*Savorgnan* v. *United States*, 338 U. S. 491, 504-506) and remaining without constraint. *McGrath* v. *Kristensen*, 340 U. S. 162.

In *Savorgnan* v. *United States, supra*, which involved a determination of citizenship status, a material issue was whether petitioner had taken up residence abroad. The Court observed (338 U. S. at pp. 505-506):

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[25] Any possible suggestion that Congress, by amending the Act in other respects during and after the World War, should be deemed to have ratified the construction of the Act embodied in the *Stadtmuller* and *Vowinckel* cases would totally ignore the realities. Congressional legislation during and after World War II proceeded on the premise that all property of enemy nationals could be vested under § 5(b) of the Act; its attention was at no time addressed to the definitions of enemy contained in § 2(a). *Cf. Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480.

> * * * the issue is not what her intent was on leaving the United States, nor whether, at any later time, it was her intent to have a permanent residence abroad or to have a residence in the United States. The issue is only whether she did, at any time between July, 1941, and November, 1945, in fact "reside" abroad. The test of such "residence" is whether, at any time during that period, she did, in fact, have a "principal dwelling place" or "place of general abode" abroad. * * * Her intent as to her "domicile" or as to her "permanent residence," as distinguished from her actual "residence," "principal dwelling place," and "place of abode," is not material. * * *

In construing income tax statutes whose application depends on "residence," the courts have similarly stated that "permanent residence" is not material and that the criterion is "where a man abides or lives," *Comm'r* v. *Fiske's Estate*, 128 F. 2d 487 (C. A. 7), certiorari denied, 317 U. S. 635; *Swenson* v. *Thomas*, 164 F. 2d 783 (C. A. 5); *Comm'r* v. *Swent*, 155 F. 2d 513 (C. A. 4); *Price* v. *United States*, 87 F. Supp. 901 (N. D. Ill.). It is enough if the purpose is such that it requires an extended stay and to that end the person remains. His intention at all times to return to his domicile elsewhere makes him no less a resident. *Comm'r* v. *Nubar*, 185 F. 2d 584 (C. A. 4), certiorari denied, 341 U. S. 925; *Buscaglia* v. *Fiddler*, 157 F. 2d 579 (C. A. 1).

We believe that the application of this test, rather than that of domicile, in the case of the

Trading With the Enemy Act, more faithfully serves the purpose of the Congress which enacted § 2 and is more in harmony with the statutory language. The test of "domicile" results in almost the narrowest possible interpretation of "resident within" and restricts correspondingly the application of the Act, contrary to the settled rule of construction that the provisions of the Act for the seizure and disposition of enemy property should be liberally construed to effectuate the purposes they were enacted to subserve. *United States* v. *Chemical Foundation*, 272 U. S. 1, 10; *Propper* v. *Clark*, 337 U. S. 472, 481.[26]

Even if domicile, rather than residence, had been made the touchstone of the statute, respondent would not appear to qualify. When she returned to Japan in 1924, she intended to stay there for an indefinite period. And "the essential fact that

[26] Respondent's reentry into the United States in 1950 after the vesting of her property in 1943 is of no consequence in this proceeding. It is well settled that a change in the status of an enemy subsequent to the vesting of his property does not absolve the property of its enemy character. *Swiss Nat. Ins. Co.* v. *Miller*, 267 U. S. 42.

Nor can the determination of the Assistant Commissioner of Immigration that respondent did not abandon her domicile in the United States (R. 49-51) foreclose an independent decision by the courts in a matter in which they have exclusive jurisdiction. See, *Walker-Hill Co.* v. *United States*, 162 F. 2d 259, 263 (C. A. 7), certiorari denied, 332 U. S. 771; *Swiss Nat. Ins. Co.* v. *Crowley*, 136 F. 2d 265, 267 (C. A. D. C.), certiorari denied, 320 U. S. 763.

raises a change of abode to a change of domicil is . . . the absence of any present intention of not residing permanently or indefinitely in the new abode." *Williamson* v. *Osenton*, 232 U. S. 619, 624.[27]

Finally, whatever may have been the rule under the 1917 Act, this Court in *Clark* v. *Uebersee Finanz-Korp., A. G.*, 332 U. S. 480, 488, declared that in order to give effect to the 1941 amendments of the Act, the definitions of § 2 must now be regarded as "merely illustrative, not exclusionary". As we have pointed out, the Custodian has, pursuant to § 5(b) as amended in 1941, been authorized to vest property of any "national of a designated enemy country." Under the applicable definitions, property of a German or Japanese citizen present in enemy territory during the war was thus subject to being vested and ordinarily was

[27] The fact that plaintiff's husband may have had an American domicile does not alter matters. The Trading With the Enemy Act law looks to the political and economic realities and aims at preventing the individual's resources from reaching the enemy camp. *Clark* v. *Uebersee Finanz-Korp., A. G.*, 332 U. S. 480; *Silesian-American Corp.* v. *Clark*, 332 U. S. 469. In this context the fiction of identifying the wife's domicile with that of her husband has no application. *United States* v. *Krepper*, 159 F. 2d 958 (C. A. 3); *McGrath* v. *Zander*, 177 F. 2d 649 (C. A. D. C.). Indeed, the fiction has been widely abandoned in other areas of the law. *Taylor* v. *Milan*, 89 F. Supp. 880, 883 (W. D. Ark.); *Younger* v. *Gianotti*, 176 Tenn. 139, 138 S. W. 2d 448, 128 A. L. R. 1422; *Commonwealth* v. *Rutherford*, 160 Va. 524, 169 S. E. 909, Goodrich, *Conflict of Laws* (2d Ed., 1938), p. 58.

vested. In § 32 of the Act, added in 1946, Congress declared that property of such citizens, so present, should not be administratively returned. In order to fulfill the purpose of these World War II enactments, we submit that this Court should hold that an enemy citizen, who was present in enemy territory during the war, must be deemed an "enemy" for all purposes under the Act.

CONCLUSION

As a citizen of Japan the respondent is a "national" of Japan within the intendment of § 39 of the Trading With the Enemy Act and may not recover her property under § 9(a) of the Act. Alternatively, because of her presence in Japan from 1924 to 1950 she was an "enemy" under § 2(a) of the Act and for that reason ineligible to recover under § 9(a). Accordingly, the judgment of the Court of Appeals for the Seventh Circuit should be reversed, and the judgment of the District Court dismissing the complaint reinstated.

Respectfully submitted,

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NOVEMBER, 1951.

APPENDIX

1. Trading With the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. 1 et seq.:

* * * * *

SEC. 2. That the word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the succesful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

* * * * *

Sec. 5 (as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App. 616):

* * * * *

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, of privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and

further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

SEC. 7 (as amended by the Act of November 4, 1918, 40 Stat. 1020). * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

SEC. 9 (as amended by the Act of March 4, 1923, 42 Stat. 1511). (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with

the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of

the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

(b) In respect of all money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, if the President shall determine that the owner thereof at the time such money or other property was required to be so conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or at the time when it was voluntarily delivered to him or was seized by him was—

* * * * *

(9) An individual who was at such time a citizen or subject of Germany, Austria, Hungary, or Austria-Hungary, or who is not a citizen or subject of any nation, State, or free city, and that such money or other property, or the proceeds thereof, if the same has been converted, does not exceed in value the sum of $10,000, or although exceeding in value the sum of $10,000 is nevertheless susceptible of division, and the part thereof to be returned hereunder does not exceed in value the sum of $10,000: *Provided*, That an individual shall not be entitled, under this paragraph, to the return of any money or other property owned

by a partnership, association, unincorporated body of individuals, or corporation at the time it was conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or seized by him hereunder; or

* * * * *

SEC. 32 (as added by the Act of March 8, 1946, as amended by the Act of August 8, 1946, 60 Stat. 50, 930, by the Act of August 5, 1947, 61 Stat. 784, and by the Act of September 29, 1950, 64 Stat. 1080 (50 U. S. C. App., Supp. IV, 32)). (a) The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

(2) that such owner, and legal representative or successor in interest, if any, are not—

(A) the Government of Germany, Japan, Bulgaria, Hungary, or Rumania; or

(B) a corporation or association organized under the laws of such nation: *Provided*, That any property or interest or proceeds which, but for the provisions of this subdivision (B), might be returned under this section to any such corporation or association, may be re-

turned to the owner or owners of all the stock of such corporation or of all the proprietary and beneficial interest in such association, if their ownership of such stock or proprietary and beneficial interest existed immediately prior to vesting in or transfer to the Alien Property Custodian and continuously thereafter to the date of such return (without regard to purported divestments or limitations of such ownership by any government referred to in subdivision (A) hereof) and if such ownership was by one or more citizens of the United States or by one or more corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia: *Provided further,* That such owner or owners shall succeed to those obligations limited in aggregate amount to the value of such property or interest or proceeds, which are lawfully assertible against the corporation or association by persons not ineligible to receive a return under this section; or

(C) an individual voluntarily resident at any time since December 7, 1941, within the territory of such nation, other than a citizen of the United States or a diplomatic or consular officer of Italy or of any nation with which the United States has not at any time since December 7, 1941, been at war: *Provided,* That an individual who, while in the territory of a nation with which the United States has at any time since December 7, 1941, been at war, was deprived of life or substantially deprived of liberty pursuant to any law, decree, or regulation of such nation discriminating against political, racial, or religious groups, shall not be deemed to have voluntarily resided in such territory; or

(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section, was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory: *Provided*, That notwithstanding the provisions of this subdivision (D) return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation: *And provided further*, That, notwithstanding the provisions of subdivision (C) hereof and of this subdivision (D), return may be made to an individual who at all times since December 7, 1941, was a citizen of the United States, or to an individual who, having lost United States citizenship solely by reason of marriage to a citizen or subject of a foreign country, reacquired such citizenship prior to the date of enactment of this proviso if such individual would have been a citizen of the United States at all times since December 7, 1941, but for such marriage: *And provided further*, That the aggregate value of returns made pursuant to the foregoing proviso shall not exceed $5,000,000; and in making returns under such proviso the Alien Property Custodian shall to the extent practicable made such returns in the order in which notices of claims therefor were

received and may return any property or interest if the value thereof, taken together with the aggregate value of property and interests already returned or pursuant to such proviso, does not exceed $5,000,000;.

(E) a foreign corporation or association which at any time after December 7, 1941, was controlled or 50 per centum or more of the stock of which was owned by any person or persons ineligible to receive a return under subdivisions (A), (B), (C), or (D) hereof: *Provided*, That notwithstanding the provisions of this subdivision (E), return may be made to a corporation or association so controlled or owned, if such corporation or association was organized under the laws of a nation any of whose territory was occupied by the military or naval forces of any nation with which the United States has at any time since December 7, 1941, been at war, and if such control or ownership arose after March 1, 1938, as an incident to such occupation and was terminated prior to the enactment of this section; and

(3) that the property or interest claimed, or the net proceeds of which are claimed, was not at any time after September 1, 1939, held or used, by or with the assent of the person who was the owner thereof immediately prior to vesting in or transfer to the Alien Property Custodian, pursuant to any arrangement to conceal any property or interest within the United States of any person ineligible to receive a return under subsection (a) (2) hereof;

(4) that the Alien Property Custodian has no actual or potential liability under the Renegotiation Act or the Act of October 31, 1942 (56 Stat. 1013; 35 U. S. C. 89-96), in respect of the property or interest or proceeds to be

returned and that the claimant and his predecessor in interest, if any, have no actual or potential liability of any kind under the Renegotiation Act or the said Act of October 31, 1942, or in the alternative that the claimant has provided security or undertakings adequate to assure satisfaction of all such liabilities or that property or interest or proceeds to be retained by the Alien Property Custodian are adequate therefor; and

(5) that such return is in the interest of the United States.

* * * * *

SEC. 39 (as added by the Act of July 3, 1948, 62 Stat. 1246 (50 U. S. C. App., Supp. IV, 39)). No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act or of the Philippine Property Act of 1946.

* * * * *

2. Pub. Res. No. 8 of July 2, 1921, 42 Stat. 105, 106:

* * * * *

SEC. 5. All property of the Imperial German Government, or its successor or successors, and of all German nationals which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, and all property of the Imperial and Royal Austro-Hungarian Government, or its successor or successors, and of all Austro-Hungarian nationals which was on December 7, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or any of its officers, agents, or employees from any source or by any agency whatsoever, shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, or the Imperial and Royal Austro-Hungarian Government, or its agents, since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise, and also

shall have granted to persons owing permanent allegiance to the United States of America most-favored-nation treatment, whether the same be national or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce and industrial property rights, and until the Imperial German Government and the imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively confirmed to the United States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the property of the Imperial German Government or German nationals or the Imperial and Royal Austro-Hungarian Government or Austro-Hungarian nationals, and shall have waived any and all pecuniary claims against the United States of America.

* * * * *

3. EXTRACT FROM PUBLIC [HARRISON] RESOLUTION NO. 53, 73D CONGRESS [48 Stat. 1267]:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That so long as Germany is in arrears in any payments of principal or interest, including interest at the rate of 5 per centum per annum on principal installments not paid when due, under the debt-funding agreement between Germany and the United States, dated June 23, 1930, with respect to Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, all payments, conveyances, transfers, or deliveries of money or property or the income, issues, profits, and/or avails thereof authorized or

directed to be made under the Trading with the Enemy Act, as amended, or the Settlement of War Claims Act of 1928, as amended, whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property, or the income, issues, profits, and/or avails thereof reserved: *Provided, however,* That such of the funds as are from time to time available (without taking into consideration interest thereafter accruing) under the Settlement of War Claims Act of 1928, as amended, for the payment of principal and interest upon awards of said Mixed Claims Commission shall be applied when available to the payment of principal and interest upon such awards in the same manner and to the same extent as though certain of the payments provided for in said Act had not been postponed under this resolution: *Provided further,* That the President may, in his sole discretion, remove the restriction as to any of the cases or classes of cases in relation to which payments, conveyances, transfers, or deliveries have been postponed under this resolution: *And provided further,* That the President is authorized to determine, for the purposes of this resolution, the period or periods in which Germany is in arrears in the payments hereinbefore described, and his determination thereof shall not be subject to judicial review.

[Approved June 27, 1934.]

4. Joint Resolution of May 7, 1940, 54 Stat. 179:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person to furnish under oath, complete information relative to any transaction referred to in this subdivision or to any property in which any such foreign state, national or political subdivision has any interest, including the production of any books of account, contracts, letters, or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed."

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

5. First War Powers Act, 1941, Title III, c. 593, 55 Stat. 838, 840:

* * * * *

SEC. 302. All acts, actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made, or issued by, or pursuant to the direction of, the President or the Secretary of the Treasury under the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, which would have been authorized if the provisions of this Act and the amendments made by it had been in effect, are hereby approved, ratified, and confirmed.

* * * * *

6. War Claims Act of 1948, c. 826, 62 Stat. 1240, 1246:

* * * * *

SEC. 12. The Trading With the Enemy Act of October 6, 1917, as amended, is hereby amended by adding at the end thereof the following new section:

"SEC. 39. No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act or of the Philippine Property Act of 1946."

SEC. 13. (a) There is hereby created on the books of the Treasury of the United States

a trust fund to be known as the War Claims Fund. The War Claims Fund shall consist of all sums covered into the Treasury pursuant to the provisions of section 39 of the Trading With the Enemy Act of October 6, 1917, as amended. The moneys in such fund shall be available for expenditure only as provided in this Act or as may be provided hereafter by the Congress.

* * * * *

7. Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended, 6 F. R. 2897:

SEC. 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * * * *

SEC. 5. * * *

E. The term "national" shall include,

(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order.

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined * * *

* * * * *

8. Executive Order No. 9193, July 6, 1942, 7 F. R. 5205, as amended by Executive Order 9567, 10 F. R. 6917:

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, in-

cluding, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

(a) Any business enterprise within the United States which is a national of a designated enemy country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of, or on account of, or owing to, or which is evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by an enemy country or national thereof;

(b) Any other business enterprise within the United States which is a national of a foreign country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by a foreign country or national thereof, when it is determined by the Custodian and he has certified to the Secretary of the Treasury that it is necessary in the national interest, with respect to such business enterprise, either (i) to provide for the protection of the property, (ii) to change personnel or supervise the employment policies, (iii) to liquidate, reorganize, or sell, (iv) to direct the management in respect to operations, or (v) to vest;

(c) Any other property or interest within the United States of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, a designated enemy country or national thereof * * *

* * * * *

10. For the purpose of this Executive order:

(a) The term "designated enemy country" shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary, and Rumania) and any other country with which the United States is at war in the future. The term "national" shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended: *provided, however,* that persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon me by section 5 (b) of the Trading With the Enemy Act, as amended.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 169

J. HOWARD McGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN,

Petitioner,

vs.

KAKU NAGANO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

EDWARD R. JOHNSTON,
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BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court (R. 33-37) is reported at 88 F. Supp. 897. The opinion of the Court of Appeals (R. 54-65) is reported at 187 F. 2d 759.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the brief for petitioner.

QUESTIONS PRESENTED.

1. Whether the true purpose of Section 39 of the Trading with the Enemy Act is to make provision for the net proceeds "remaining upon the completion of administration, liquidation and disposition pursuant to the provisions of this Act"[1] *i. e.*, the enemy property subject to legislative disposition after the completion of Section 9(a) returns to friendly aliens; or whether as urged by petitioner the purpose of Section 39 is by implication to bar the right of return under Section 9(a) in a suit which was

   (a) pending before the passage of Section 39; and

   (b) brought by a friendly alien resident within the United States, where such alien was of Japanese nationality.

2. Whether in holding that respondent's temporary and transitory presence in Japan did not constitute her an enemy within the meaning of the Trading with the Enemy Act, the court below correctly applied to the particular facts of the present case the rule of construction which has been uniformly followed in the federal courts in repeated decisions since the enactment of the statute in 1917.

1. Quoted language taken from Section 39; see *infra*. App. p. iii.

STATUTES INVOLVED.

The statute involved is the Trading with the Enemy Act of 1917, as amended, with particular reference to Section 9(a) and the asserted effect upon it of Section 39 as enacted subsequent to the filing of the present suit. Other sections and Executive Orders are indirectly involved insofar as they bear upon the construction of Sections 9(a) and 39. The relevant sections and Executive Orders are set forth in the Appendix, *infra*.

STATEMENT.

The present suit was filed by respondent on December 19, 1947, under Section 9(a) of the Trading with the Enemy Act, which provides for the return of vested property to owners who establish that they are non-enemies (R. 2-12).[2] The property involved is respondent's minority stock in her husband's business, The Fuji Trading Company, a corporation of Illinois organized in 1912 (R. 3). Both plaintiff and her husband are permanent residents of the United States (R. 2). The capital stock of the corporation consists of 15,000 shares of which 9,315 are owned by the husband, Shinsaku Nagano; 5,670 by respondent; and 15 by respondent's brother, Yoshi Miya (also a permanent resident of the United States; see Note 2), who was employed for many years as the company's production manager (R. 4; and opinion, *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753, 755).

The company sells oriental food products such as chop suey vegetables and sauces, bean sprouts and water chestnuts (R. 3), all produced in its canning factory in Chicago. The factory was built by respondent's husband, Shinsaku Nagano, who leased it to the company for the purpose of

2. The case is before this Court upon the government's motion to dismiss the complaint (R. 28). The District Court sustained the motion (R. 38) and the Court of Appeals reversed on the ground that the complaint set forth a good cause of action not barred by the provisions of Section 39 of the Trading with the Enemy Act (R. 65). The facts are therefore undisputed and all inferences favorable to respondent are admitted by the motion. In the present statement references are made to certain additional facts which would be competent evidence under the allegations of the complaint. All such statements are based upon the record in *Shinsaku Nagano* v. *McGrath*, 187 F. 2d, 753, which is familiar to petitioner, and are identified by reference to the present footnote.

its operation (See Note 2). The business itself was founded by Mr. Nagano in 1910. Under his management and direction it has for many years enjoyed national distribution of its products (R. 3). The business has been described as Mr. Nagano's *alter ego*.[3]

Respondent's husband has been a permanent resident of this country since 1906 (R. 2). His identity with the community is genuine and deep rooted. His investments are substantial and permanent. They have been always in Chicago, never in Japan. Mr. Nagano's testamentary plan for himself and respondent under his will executed in 1930 confirmed their Chicago residence and named a Chicago bank as trustee of his estate. He has been active in the affairs of the community, receiving, for example, the commendation of Rufus F. Dawes for his contribution of services as Chairman of the Japanese Committee during the Century of Progress Exposition (See Note 2).

As native born Japanese (R. 2) neither respondent nor her husband were eligible, under our naturalization laws, for United States citizenship. The petitioner has never determined the husband to be an enemy, nor sought to act against him under the Trading with the Enemy Act. The petitioner has not at any time questioned the loyalty of either respondent or her husband to the United States. However, if the position taken by petitioner is sound, both respondent and her husband are "nationals" of Japan who, by Section 39, are deprived of any right of recovery under Section 9(a). Nevertheless, property of the husband which had been mistakenly vested in the belief that it belonged to an enemy has recently been returned to him in a Section 9(a) proceeding: *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753 (C. A. 7th, 1951). Petitioner has not sought a review of the latter case which was decided by the Court

3. See opinion, *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753, 755.

of Appeals on the same day as the present Kaku Nagano case.

At the outbreak of the war Mr. Nagano was in Chicago but his wife was in Japan seeking to arrange the marriages of their two daughters[4] (R. 2, 6, 7). This parental purpose was shared equally between respondent and her husband (R. 6).

The circumstances leading up to the foregoing state of affairs in 1941 have their inception in the needs of the children of respondent and her husband.

After residing in the United States from the time of her immigration here in 1915 Mrs. Nagano in 1924 commenced the task of giving her son[5] an Oriental education (R. 6). Her husband considered such an education to be a necessary qualification for their son's ultimate entry into the company's importing business (R. 6). It was the common plan of both parents that the son might ultimately relieve the father of the necessity of making annual purchasing trips to the Orient to establish sources of supply and secure the raw material inventories needed for the business. (See note 2.)

A Japanese education for the daughters was considered needful to enhance their prospects for marriage, limited as they were to members of their own race (R. 6). All choice of decision on bringing the daughters to the United States was taken away by the Oriental exclusion provisions of the Immigration Act of 1924, 43 Stat. 153, 8 U. S. C. 201, *et seq.* (R. 6, 19, 20, 56).

---

4. Born in Japan, respectively, in 1914 and 1919 (R. 5, 6). The first daughter was born prior to respondent's immigration to the United States (R. 5). The second daughter was born during a stay in Japan while on a voyage occasioned by Mr. Nagano's convalescence from influenza suffered during the 1919 epidemic (R. 6).

5. Born in Chicago in 1916.

Mrs. Nagano rejoined her husband at Chicago in 1929[6] and again in 1932, each time remaining for nearly a year (R. 7, 51). In administrative proceedings the Department of Justice (Immigration Service) has found as a fact that on both of these occasions she entered as a permanent resident returning from a temporary absence abroad (R. 51). Absences from the United States prior to 1933 are therefore not material to the case. The factual issue involved in the second "question presented" (*supra*, p. 2) is whether the period from 1933 to 1941[7] represented a temporary and transitory absence, having in mind that the facts are undisputed and that all inferences favorable to respondent are admitted by the motion to dismiss (R. 28-32).

In 1933 one daughter had already attained marriageable age (19 years). The other daughter would do so by 1937 (R. 6). The son was old enough (age 17; R. 6) so that his mother's presence would no longer be necessary during the completion of his university education. During Mrs. Nagano's absence from 1933 to 1941 her efforts were devoted almost exclusively toward arranging marriages for the daughters (R. 6, 19).

In Japan such marriages are arranged for by the parent and a friend acting as intermediary who is called a matchmaker. The presence of the parent with the unmarried daughter is indispensable (R. 6). A record of respondent's efforts toward these marriages is preserved in respondent's voluminous correspondence (R. 7, 20), all written years before any such correspondence could be regarded as self-serving. Her letters to her husband establish that marriages seemed imminent in 1939, 1940 and 1941, and that

6. The government suggests that there is some doubt as to the 1929 entry (Brief, p. 4, n. 2). This entry was found to be a fact (R. 51).

7. The war eliminated all possibility of return after 1941 until permission to return was obtained in 1950 (R. 49-51). Hence only the period 1933-1941 is involved.

she had a lively expectation of an early consummation of her duties, to be followed by a prompt and final return to the United States (R. 7; see also note 2).[8]

Such facts and others, including the corroborating testimony of persons in Japan, were reviewed by the United States Department of State. As a result a visa was granted under Section 4(b) of the Immigration Act to Mrs. Nagano as a permanent resident returning from a temporary visit abroad (R. 49, 50). Subsequently, upon respondent's physical entry into the United States, the Justice Department, Immigration Service, taking note of the period of absence, convened a Board of Special Inquiry which made a *de novo* investigation. From this investigation the Immigration Service reached the conclusion (R. 50) that

> "there is ample evidence of record to support the conclusion reached by the Board of Special Inquiry and the American Consular Service that the Appellant is returning from a temporary visit abroad."

Considering the allegations of the complaint, the Court below arrived at the parallel view that

> "the fact that she went to Japan in an attempt to discharge her parental duties does not negate the fact that her permanent residence was in Chicago and that her stay in Japan was for a limited period of time entailed by her praiseworthy sense of family obligation",

and concluded that "there is nothing in the averments of fact justifying a conclusion of fact that plaintiff was 'resident within' Japan" (R. 58, 59).

In reply the government contended that regardless of respondent's United States residence, her right of recovery under Section 9(a) of the Trading with the Enemy Act was

8. It would be competent upon the trial to complete the history of the marriage efforts by establishing that the marriages were in fact consummated, the second marriage taking place immediately before Mrs. Nagano's return to the United States.

taken away by Section 39 enacted on July 3, 1948, while the present suit was pending. The court below held that Section 39 was not applicable because it was concerned with forfeitable enemy property (R. 64) rather than friendly property which is the only kind returnable under Section 9(a). A conflicting conclusion has been reached by the Court of Appeals for the District of Columbia in the case of *Guessefeldt* v. *McGrath*[9] and this Court has granted certiorari in both cases.

9. No. 10,600, May 3, 1951 (C. A. D. C.) (pending on writ of certiorari, No. 204, this term). The conclusions by the respective courts are in conflict but respondent's position is that the cases are distinguishable because the *Nagano* case was filed before the enactment of Section 39.

SUMMARY OF ARGUMENT.

I. Section 39 of the Trading with the Enemy Act does not affect the right of suit heretofore existing under Section 9(a) because (a) Congress intended to deal only with the fund of enemy property remaining after administration and disposition, including Section 9(a) returns; (b) no amendment of Section 9(a) could have been lawfully effected in the form in which Section 39 was passed; and (c) so long as resident aliens are classified as friends, no constitutional right exists to deprive them of the right to recover property erroneously seized.

Congress' intention in passing Section 39 is established by the *functions* of that section within the framework of the Act, by its *language*, and by the *legislative history*.

1. *Functions of Section 39.* Section 9(a) is concerned exclusively with the return of friendly property. After friendly property has been returned there remains a fund of enemy property. Section 12 of the Act provides that after the end of the War the enemy property is to be disposed of as Congress directs. Necessarily the *function* of Section 39 is one of two things: (1) to dispose of the enemy property as contemplated by Section 12; or (2) to dispose of all property whether enemy or friendly, and whether taken by mistake or not, which belongs to Germans or Japanese even though they are lifelong residents of the United States. The first function obviously permits the parts of the Act, Sections 9(a), 12, 32(a) and 39 to work together as an integrated whole. The second function must be rejected as having no reasonable relationship to the structure of the Act. It brings Section 39 into conflict with Sections 9(a), 12 and 32(a) because it would "repeal" Sec-

tion 9(a), dispose of funds not contemplated under Section 12, and eliminate the right of judicial review provided under Section 9(a) which made practicable the omission of any such right under Section 32(a). The second function is tantamount to declaring that Congress by mere implication alone intended to bar the *return* to a lawful resident alien of property which our legislative and administrative policy *never intended to be taken away* on the mere ground, by itself, of technical enemy citizenship.[10] As said in *Ex Parte Kumezo Kawato*, 317 U. S. 69, 76 (1942), the Trading with the Enemy Act was never intended, without Presidential proclamation, to affect resident aliens at all.

2. *Language of Section 39; the word "national".* The language of the Act states expressly that it is dealing not with vested property generally but only with the net proceeds remaining after "*administration, liquidation* and *disposition*" otherwise provided by the Act. Returns of friendly property under Section 9(a) are clearly included within the term "administration and disposition." Furthermore, the net proceeds clause plainly signifies that Congress is looking to the fund of enemy property which can be disposed of only by legislative authority and direction. Even if consideration of the language of Section 39 is pin-pointed upon the single word "national", a successful claimant under Section 9(a) will have succeeded in establishing that she is not a "national of a designated enemy country." This is the only sense in which "national" is used in Section 39 since only such nationals are the intended objects of the vesting process.

3. *Legislative History.* The legislative history of Section 39 includes explicit statements in the Committee reports that the fund dealt with is *enemy* property and also statements by the Honorable Dean Acheson, then Acting

10. See brief for the government, p. 21, n. 11.

Secretary of State and John Ward Cutler, Acting General Counsel, Office of Alien Property, proposing the legislation in very nearly the language ultimately adopted. The statements in question expressly identify the property as that which remains after Section 9(a) returns and identify the words "after administration, liquidation and disposition" as signifying such property only.

II. No amendment by implication, retroactive or otherwise, but particularly a retroactive amendment, of Section 9(a) could have been lawfully effected by Section 39 without even a reference to Section 9(a). This follows not only from the accepted rules of statutory construction but from the express provisions of 61 Stat. 633, 1 U. S. C. 109, providing that the repeal of any statute (even an express repeal) shall not release or extinguish any liability thereunder unless the repealing act shall expressly so provide.

III. No constitutional right exists to deprive friendly aliens of their property without just compensation, the Supreme Court having held that the constitutional guarantee includes such aliens. Resident aliens are still deemed friendly, regardless of nationality and are therefore within the guarantee. The validity of the Trading with the Enemy Act depends upon adequate provision for the return of property in case of mistake.

IV. No valid reason exists for modifying the decision of the Court of Appeals that upon the facts alleged respondent was not "resident within" Japan since the decision involves only the application of familiar rules to the particular facts and no conflict of decision or other important question is presented to this Court. In administrative proceedings based upon actual evidence petitioner's Immigration Service has determined that respondent's absence in Japan for family purposes, before she returned to her hus-

band, was only temporary. The Court of Appeals has properly decided that under the complaint respondent may establish that she was not "resident within" Japan and was not an "enemy".

The government did not contend in the Court of Appeals nor in its petition for a writ of certiorari that respondent's mere presence in the enemy country by itself would bar recovery under Section 9(a). That contention, belatedly added to the government's present brief, is without merit because although presence in the enemy country may justify vesting (which is authorized on the basis of appearances, without investigation), yet it is uniformly held that such presence does not foreclose judicial relief in a Section 9(a) suit. In such a suit relief is barred only by enemy character based on residence in the enemy country or other actual enemy taint.

The decision below should be affirmed.

ARGUMENT.

I.

In Enacting Section 39 of the Trading With the Enemy Act, Congress Had No Intention of Amending Section 9(a) Providing for the Return of Friendly Property Because the Concern of Congress Was Exclusively With the Enemy Property Subject to Legislative Disposition After Administration and Disposition Including Section 9(a) Returns.

Specifically, the concern of Congress in enacting the War Claims Act of 1948 of which Section 39 was a part, was (a) to create a war claims plan under which it would designate the classes of persons to whom vested enemy property would be distributed after the war; and (b) to express the irrevocable policy decision that enemy property would not ever be returned to former enemies as was done after World War I.[11] This intention is clearly established by the functions of Section 39 within the framework of the Act. It is established by the express language of the Act and equally by the legislative history of the Act.

At the outset of its argument the government quotes Section 39 and states that it is a "flat, unqualified prohibition" of returns to German or Japanese nationals.[12] The fallacy of the assertion, however, is in effect pointed out by the petitioner itself. In order to maintain its logical

11. So held below in the District Court (R. 36-37) and in the Court of Appeals (R. 64).

12. Brief, pp. 10-11.

position petitioner found it necessary to omit from the quoted section the following clause:

> "The *net* proceeds, remaining upon the completion of administration, liquidation and disposition *pursuant to the provisions of this Act* of any such property or interest therein shall be covered into the Treasury at the earliest practicable date." (Emphasis supplied.)

As will be seen in the discussion below of the functions of the Act and its legislative history, the last quoted language identifies the property involved in Section 39 as the fund of *enemy* property remaining after Section 9(a) returns, which is returnable only by Congressional action.[13]

The "flat unqualified prohibition", moreover, is not substantially different from and no more drastic than the Act of Congress adopted in 1921[14] following World War I, but up to the time of petitioner's present brief no one to our knowledge (including the government or any court) has ever suggested that the 1921 Act applied to Section 9(a) returns. That Act provided that "*all* property" of "*all* German nationals" "*shall be retained by the United States of America.*"

We hasten to add that after the words "United States of America" there followed: "and no disposition thereof made *except as shall have been heretofore* or specifically hereafter shall be *provided by law.*" The omission of the latter clause would of course produce a "flat unqualified prohibition" just as does the above mentioned omission of language from Section 39.

1. *Functions of Section 39.* Initially, property is seized by the Alien Property Custodian on *suspicion* that it is

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13. See legislative history, *infra*. p. 26 *et seq.*

14. 42 Stat. 105-107; for further discussion see *infra*. p. 32.

enemy property, the action being taken on appearances and without investigation.[15]

By definition, Section 9(a) is a proceeding for the return of property to "*any person not an enemy* claiming any interest, right or title in any money or other property which may have been seized by him" (the Custodian).[16] (Emphasis supplied.)

Under Section 2 (a) of the Act "residence within" the enemy country is made the test for determining whether an individual is an "enemy",[17] so that in a Section 9 (a) suit the issue is made to turn upon residence and not upon nationality. In World War II the necessity of coping with disguised enemy interests gave rise to a broadened concept of "enemy" as expressed in the term "national of a designated enemy country."[18] The broadened term per-

15. "If he has a strong suspicion that property is German property it is his conscientious duty to vest it. Subsequent investigation may indicate that he was mistaken, and in such a case he will return the property":—testimony of Max Isenbergh, Chief, Appeals and Legislative Branch, Office of Alien Property, Justice Department, given before subcommittee of the Senate Committee on the Judiciary in hearings on the War Claims Act, 80th Congress, Second Session, page 13 of printed report of hearings. See also *Clark* v. *Uebersee Finanz-Korporation*, 158 F. 2d 313, at 315 to the same effect.

16. Sec. 9(a), *infra*, App. p. i.

17. Sec. 2(a), *infra*, App. p. i.

18. Defined in Executive Orders 8389 and 9095 promulgated under the authority of Section 5(b), *infra*, App. pp. iii, iv. See *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 485 (1947) in which the court explained that Germany had developed techniques for concealing enemy ownership, particularly through the corporate guise. The opinion goes on (page 485): "Section 5(b) was amended on the heels of the declaration of war to cope with that problem. Congress by that amendment granted the President the power to vest in an agency designated by him 'any property or interest in property of any foreign country or national thereof.' The property of all foreign interests was placed within the vesting power not to appropriate friendly or neutral assets, but to reach enemy interests which masqueraded under those innocent fronts."

mitted persons, even United States citizens, to be characterized as such "nationals" if they were acting "on behalf of (including cloaks for) the enemy."[19] The residence test, however, was retained, with the result that persons not "resident within" the enemy country are not considered "nationals" thereof by reason of enemy citizenship alone.[20] Indeed, the question of whether Mrs. Nagano was "resident within" Japan is one of the two issues which petitioner has brought to this Court for review.[21]

Section 9 (a) is, therefore, concerned exclusively with the return of non-enemy (that is to say, friendly) property, determined according to the test of residence.

After Section 9 (a) returns have been completed, the fund of property remaining in the hands of the Custodian consists of enemy property alone. Obviously it is necessary to look elsewhere in the Act than Section 9(a) to ascertain what disposition is contemplated for this enemy fund. A direct provision in this regard is found in Section 12, as follows:

> "After the end of the war any claim of any enemy or ally of enemy to any money or other property held by the Alien Property Custodian * * * shall be settled as Congress shall direct."

After the end of World War I, the fund of enemy property referred to in Section 12 was first retained under the provisions of the Resolution of Congress Terminating the War with Germany, July 2, 1921, 42 Stat. 105-107, and finally returned in part (80% returned, 20% retained) under the Settlement of War Claims Act of 1928, 45 Stat. 254-279.

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19. Executive Order 9095, Par. 10(a), *infra*, App. p. iv.

20. See authorities and exception in Executive Order 9095 cited and discussed *infra*, pp. 44 *et seq.*; 52 *et seq.*

21. Brief for petitioner, page 2, second question.

After the end of World War II two sections were enacted providing for the disposition of the fund in question. Section 32(a)[22] and Section 39.[23] Section 32(a) provided for returns as a matter of administrative discretion to persecutees and other individuals who are technically enemies and who would not be entitled to the return of property under Section 9(a).[24] Section 39 provides that *"The net proceeds remaining upon the completion of administration, liquidation and disposition pursuant to the provisions of this Act"* shall not be returned to nationals of Germany or Japan but "shall be covered into the Treasury" to be applied in payment of certain war claims.

In identifying the functions of Section 39 it is necessary to take into consideration the fact that it is one of an integrated series of provisions contained in the War Claims Act of 1948, 62 Stat. 1246. It appears as Section 12 of that Act. The Act in question was a comprehensive measure defining the classes of persons entitled to file war claims. Such claims included employees of contractors;[25] civilian Americans who were captured or who went into hiding to avoid capture at Midway, Guam, Wake Island and the Philippine Islands;[26] prisoners of war;[27] and religious organizations.[28]

The nature and limits of the claims were defined, *e. g.*, detention benefits at the rate of $60.00 per month.[29] A

22. *Infra*, App. p. ii.

23. *Infra*, App. p. iii.

24. *McGrath* v. *Zander*, 177 F. 2d 649, 652 (1949); see Sec. 32 (a), *infra*, App. p. ii. The same point is made in the government's brief, p. 12.

25. Sec. 4, War Claims Act of 1948.

26. *Id.* Sec. 5.

27. *Id.* Sec. 6.

28. *Id.* Sec. 7.

29. *Id.* Sec. 5(d).

War Claims Commission was created with jurisdiction to receive and adjudicate the claims in question.[30]

Section 13 creates on the books of the Treasury of the United States a War Claims Fund, consisting of the sums covered into the Treasury under the provisions of Section 12 (Section 39 of the Trading with the Enemy Act, as amended). The intention of the Congress, therefore, was obviously centered on the creation of machinery for the establishment of the claims of those persons and corporations included within the purview of the Act and the creation of a war claims fund from which such claims could be paid. The latter fund was created exclusively out of *enemy* assets held in the hands of the Alien Property Custodian.[31] It follows that there was no intention to interfere with the long established provision of the Trading with the Enemy Act affording relief to *non-enemy* aliens, it being observed that Section 9(a), *by definition*, is concerned only with returns to non-enemies.

If Section 39 is considered solely from the standpoint of its mechanical function, it will readily be seen that there are only two possible functions as follows:

> (i) To dispose of the "net proceeds" remaining in the hands of the Custodian after administration, liquidation, and disposition pursuant to the other provisions of the Act. Such proceeds consist of the fund of enemy property remaining after the property taken by mistake has been returned, under Section 9(a), to non-enemy owners, as a part of the "disposition" referred to in Section 39. It is the same fund of *enemy* property which remained after the end of World War I *after* all Section 9(a) claims had been paid. Eighty per cent of the World War I fund was returned to former enemies not under Section 9(a) but as a for-

30. *Id.* Secs. 2, 3.

31. So stated in Report of the Committee on the Judiciary, Senate Report No. 1742, June 16, 1948 (quoted, *infra*, p. 31.).

> giveness measure. The above fund of enemy property remaining after World War II, however, is *never* to be returned to former enemies. Instead it will be paid in satisfaction of war claims, not to the enemies but to the persons who suffered losses at the hands of the enemies.

The Court below held in substance that the foregoing is the function of Section 39 (R. 64).

If the function of Section 39 is not as above stated, then, alternatively the function must be:

> (ii) To retain, in addition to enemy property, all property whether taken by mistake or not, and whether in friendly hands or not, which belongs to persons who are citizens of Germany or Japan regardless of whether such persons are lifelong loyal residents of the United States.

The second function represents the position asserted by the petitioner herein.

The first function fits precisely into the framework of the Act and permits its several parts—in particular Sections 9(a), 12, 32(a) and 39 to work together as parts of an integrated whole.[32]

Summarizing the operation of these parts:

> Section 9(a): Authorizes returns to friendly aliens, particularly our own residents of whatever nationality. Provides judicial hearing and review. Preserves the constitutionality of the Act by guaranteeing returns to friendly aliens in case of vesting by mistake.
>
> Section 12: Directs that after the end of the war *enemy* property shall be disposed of as Congress may direct.

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32. In *Markham* v. *Cabell*, 326 U. S. 404, in holding to the effect that by amending Section 5(a) Congress did not intend to delete Section 9(a) the court said: "The normal assumption is that where Congress amends only one section of a law, leaving one untouched, the two were designed to function as parts of an integrated whole."

Section 32(a): Serves the limited purpose of providing speedy administrative relief (when found by the Executive to be in the interest of the United States) on a discretionary basis primarily to persons who were technically enemies such as Frenchmen and Belgians in occupied territory.[33] Action not subject to judicial review.

Section 39: Assures that the net fund of enemy property remaining after administration, liquidation and disposition, in the estimated amount of $200,000,000[34] will never be returned to the German and Japanese enemy aliens from whom it was vested. Implements the War Claims Act of 1948 under which this $200,000,000 fund will be applied for the benefit of designated classes of claimants.

In decided contrast the function contended for by the government plainly conflicts with the other provisions of the Act. The government's very appeal in this case is predicated on the claim that Section 39 conflicts with Section 9(a) and that the latter was impliedly repealed or superseded. If Section 39 as construed by the government does not conflict with Section 12 it certainly does not harmonize with Section 12 for the latter Section contemplates that the congressional attention after the war will be directed to the fund of enemy property remaining *after* Section 9(a) returns. The government construction of Section 39 even conflicts with Section 32(a), for the latter section is discretionary and denies judicial review, which is practicable only so long as Section 9(a) assures returns to friendly resident aliens in compliance with constitutional requirements. Such Section 9(a) returns are denied in large part under the government's construction. With these facts in mind it is apparent that the "harmony" suggested at page 14 of the government's brief is illusory. It is true also that there is no merit

33. *McGrath* v. *Zander*, 177 F. 2d 649, 652; see also government brief, p. 12.

34. See *infra*, p. 31.

in the further claim at page 14 of the government's brief that Section 39 has no meaning if it does not bar Section 9(a) suits. It has the same meaning as the 1921 Act. It disposes of a fund of enemy property estimated to amount to $200,000,000.

The extreme limit to which the government's contentions extend are illustrated by a concrete example:—the case of respondent's husband, Shinsaku Nagano, a resident of Chicago since 1906 and present in Chicago throughout the war. Shares of stock belonging to him were seized in the mistaken belief that they belonged to another person who was then thought to be an enemy. The husband himself was never intended to be a target under the Trading with the Enemy Act. Yet in the government's petition for rehearing in the *Shinsaku Nagano* case the government asserted that Section 39 was a bar to recovery.[35] In its present brief the government now suggests that Nagano would have been "presumably" eligible for administrative return under Section 32(a) (2)(D).[36] Such a suggestion is irrelevant since the allowance of claims under the latter section is a matter of arbitrary administrative relief not subject to judicial review.

Nagano in fact did seek discretionary relief under the provisions in this regard contained in Section 9(a) and he was denied such relief on the asserted ground that he was not the owner of the property. Had Section 32(a) been the only channel of relief it would then have been impossible to have the judicial determination of ownership which was actually made under the provisions of Section 9(a).

2. *Language of Section 39.* (*i*) *"Net proceeds."* As has been pointed out in discussing the functions of Section 39, the subject matter upon which it operates is not all prop-

35. Copies of the petition have been filed in the Supreme Court.

36. Brief, p. 6, n. 3.

erty vested, but only "*net proceeds*" consisting of enemy property remaining after Section 9(a) returns as a part of the "administration, liquidation and disposition pursuant to the provisions of this Act."[37] (The return of *non-enemy* property under Section 9(a) is essential to the constitutionality of the Trading with the Enemy Act: *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 566 (1920); *Becker* v. *Cummings*, 296 U. S. 74, 79 (1935). Only the remaining net fund consisting of *enemy* property is without the constitutional protection.[38])

Since the fund dealt with by Section 39 consists only of enemy property not returnable under Section 9(a) it is immaterial to the present case that the latter fund may not be returned to "nationals" of Germany or Japan even if such "nationals" are assumed *arguendo* to include friendly American residents.

Section 32(a) contains specific provisions for the return of certain enemy property to persecutees who are technical enemies.[39]

Thus it became essential that Section 39 (dealing with enemy property) should include an express exception as to Section 32(a) (also dealing with enemy property). The fact that Section 9(a) is not referred to in Section 39 does not evidence any intent to repeal Section 9(a) but on the contrary evidences recognition that Section 9(a) is concerned with a wholly different fund, *i. e.*, friendly property.

Language of Section 39: (ii) The Word "National".

Even if the entire issue with respect to Section 39 is made to turn upon the literal meaning of a single word:—

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37. Section 9(a) contains both administrative and dispository provisions.

38. *Infra*, Point III, p. 37.

39. *Supra*, p. 18 and note 24.

"national",[40] (without regard to the fact already pointed out that the fund of *enemy* property involved is one with which we are not concerned in the present Section 9(a) suit) the same result is still reached. In Section 39 the word "national" is used in the sense of "national of a designated enemy country" *because the latter class is the only one made subject to the vesting process in the first place.*[41] Such enemy nationals could not in any event succeed under Section 9(a): *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 486, 487 (1947). Their suit would fail under the provisions of Section 9(a) itself and not because of anything contained in Section 39.[42] Their only hope of recovery is by legislative grace or forgiveness such as followed World War I.[43] It is this forgiveness which Section 39 determined to rule out.

The government's brief stresses that respondent was a "national", *i. e.*, a "national of a designated enemy country" for the purpose of vesting. Such a status, however, was essentially presumptive in character for it was based on suspicion and not on investigation. In order to facilitate the vesting process the status was merely deemed to exist. The determination in this regard for the purpose of *vesting* was not necessarily the status for the purpose of the return of property under Section 9(a). For the purpose of *returns*, one who was found to be a "national" for vesting is not precluded from establishing in a Section 9(a) proceeding that he is not such a "national". In *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 486 it is stated expressly that the fact that the

40. The decision in the *Guessefeldt* case and the argument of the government are predicated almost entirely on the claimed literal meaning of the word "national."

41. Sec. 5(b) and Executive Orders 8389 and 9095, *infra*, App. pp. i, iii, iv.

42. Precisely as stated by Judge Campbell (R. 36).

43. Settlement of War Claims Act of 1928, *supra*, p. 17.

seizure was permissible does not signify that there is no remedy under Section 9(a). Every successful Section 9(a) suit arising out of World War II is based upon a finding that the successful litigant was not a "national"; and therefore such a litigant would not be within the intendment of Section 39. Neither the President nor the Congress has at any time modified the traditional[44] policy of this country that our own residents are not enemies, regardless of technical enemy citizenship. The courts have held likewise.[45]

Respondent is not a "national of a designated enemy country" and therefore she would not come within the terms of Section 39 even if Section 39 were concerned with friendly property.

The contention of the government in this case that Section 39 literally prohibits Section 9(a) returns to all persons of German or Japanese citizenship including our own loyal residents, must also be read in the light of a consistent record of previous attempts to effect the nullification of Section 9(a) by applying the asserted meaning of some

44. As stated by Alexander Hamilton in one of his famous *Camillus* Letters (Letter IXX): "There is no parity between the case of the person and goods of enemies found in our country and that of the persons and goods of enemies found elsewhere. In the former there is a reliance upon our hospitality and justice; there is an express or implied safe conduct; the individuals and their property are in the custody of our faith; they have no power to resist our will; they can lawfully make no defense against our violence; *they are deemed to owe a temporary allegiance;* and for endeavoring resistance would be punished as criminals, a character inconsistent with that of an enemy. To make them a prey is, therefore, to infringe every rule of generosity and equity; it is to add cowardice to treachery * * *" It will be observed that the foregoing views are in strikingly close parallel with the opinion of the court below as to the proper concept of citizenship (R. 64).

45. Opinion below (R. 59-60); *Guessefeldt* v. *McGrath*, No. 10,600 May 3, 1951 (C. A. D. C.); *McGrath* v. *Zander*, 177 F. 2d 649 (1949); *Sarthou* v. *Clark*, 78 F. Supp. 139, 142 (D. C. Cal., 1949).

other provision taken out of context. In *Markham* v. *Cabell*, 326 U. S. 404, 409 (1945), the government contended that claims under Section 9(a) arising out of World War II vestings were barred by the provisions of Section 9(e) to the effect that no debt shall be allowed under Section 9 *unless the debt was owing prior to October 6, 1917*, and a claim filed prior to the date of enactment of the Settlement of War Claims Act of 1928.

The Supreme Court replied (opinion, page 409):

> "Yet the remedy afforded by Section 9(a) would be quite illusory and ineffective so far as it applies to World War II claims if Section 9(e) were read literally without regard to its history. It was for this reason that the court below refused to 'make a fortress out of the dictionary' and to read Section 9(e) strictly and literally. The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes, as *Holy Trinity Church* v. *United States*, 143 U. S. 457, illustrates. The process of interpretation misses its high function if a strict reading of the law results in the emasculation or deletion of a provision which a less literal reading would preserve."

In *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 485 (1947), the government once again unsuccessfully tried to nullify Section 9(a) by standing upon the power given under Section 5(b) to vest the property of any *foreign* (friendly or enemy) country or national. A similar attempt was made in *Draeger Shipping Co.* v. *Crowley*, 49 F. Supp. 215 (1943), and at least two attempts have been made to repeal Section 9(a) by legislative enactment (See discussion, opinion below, *Nagano* v. *McGrath*, (R. 63)). All such attempts have been rejected.

3. *The legislative history.*[46] Mr. Dean Acheson, then

46. All italics in quoted matter below have been supplied.

Acting Secretary of State and John Ward Cutler, Acting General Counsel, Office of Alien Property, proposed to Congress the form of World War II War Claims Act which their respective departments favored. These proposals were almost literally adopted as Section 39. In making the proposals Messrs. Acheson and Cutler clearly indicated:

> (a) that the assets involved are those remaining after the completion of the program of allowance of claims as required by existing policies and existing law;
>
> (b) that the property involved is that which cannot be returned without congressional action;
>
> (c) that the language "net proceeds remaining upon the completion of administration, liquidation and disposition" refers to net proceeds after payment of Section 9(a) claims;
>
> (d) that liquidation itself by law cannot proceed until Section 9(a) claims are disposed of;
>
> (e) that there should be an express declaration of legislative policy that plans for the ultimate disposition of *such* proceeds shall make no provision for any return or compensation to former owners.

The foregoing statements were made during hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 80th Congress, on H. R. 873, H. R. 1823, H. R. 1000 and H. R. 2823, March and April, 1947. These bills were the initial proposals for World War II war claims legislation. None of the bills then pending represented precisely what was desired by the State and Justice Departments, whose views had been requested.[47] The proposals thereupon submitted by Messrs. Acheson and Cutler correspond nearly literally with H. R. 4044 and

47. H. R. 873 was directed against the German, Japanese and Italian governments. H. R. 1823 was directed against the Japanese only and included a much narrower range of claims to be recognized.

obviously constitute its genesis. H. R. 4044 subsequently was enacted as the War Claims Act of 1948.

Mr. Acheson's proposals were submitted in a letter to the Committee[48] which included the following:

Acheson Letter.	Corresponding Passages In War Claims Act of 1948.
"It is believed that Congress might give consideration to the enactment of legislation along the following lines:	Section 12: (Section 39, Trading with the Enemy Act.)
1. Requiring that German and Japanese assets in the United States be liquidated and the proceeds covered into the Treasury *after completion of administration and allowance of claims* as required by existing policies and existing law."[49]	"The net proceeds remaining upon the completion of administration, liquidation and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date."
"2. An express declaration of legislative policy that plans for the ultimate disposition of such proceeds shall make no provision for any return or compensation, direct or indirect, by the United States to the former owners."	"No property or interest therein of Germany, Japan or any national of either such country vested in or transferred to any officer or agent of the government at any time after Dec. 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein."
"3. That a war claims tribunal be established vested with jurisdiction to adjudicate the following classes of claims on behalf of citizens of the United States * * *."	Section 2(a): "There is

48. Reproduced at page 3 of the printed hearing.

49. See the *Isenbergh* testimony, *infra*, p. 31.

hereby established a commission to be known as the War Claims Commission * * *."

Section 3. "The Commission shall have jurisdiction to receive and adjudicate according to law claims as hereinafter provided."

The testimony of Mr. Cutler (hearings pp. 10, 11) contains phraseology literally adopted in Section 39 as will be observed:

John Ward Cutler Testimony.	Corresponding Provisions of Section 39.
"It is our recommendation that vested German and Japanese property should not be returned to its former owners and there should be no provision for compensation of such owners by this government, although it may be appropriate that the German and Japanese governments be required eventually to compensate their own nationals."	"No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agent of the government at any time after Dec. 17, 1941, pursuant to the provisions of the Act, shall be returned to former owners thereof or their successors in interest and the United States shall not pay compensation for any such property or interest therein."
"Title to vested property is now in the United States *and return cannot in any event be made without congressional action.*[50] The Congress may accordingly wish to declare itself against return with respect to Ger-	

50. See *infra*, p. 31, Max Isenbergh testimony that the total vesting would be $359,000,000 and that after administration, liquidation and returns there would remain a net fund to be disposed of in the neighborhood of $200,000,000.

many and Japan. Property formerly owned by nationals of Italy raises certain special problems upon which I believe representatives of the Department of State are best qualified to speak."

"The *net proceeds* of German and Japanese property *remaining after its administration, liquidation and disposition is completed in accordance with present law should* in our judgment be *covered into the Treasury* in line with the policy of non-return."

"The Office of Alien Property is proceeding as rapidly as possible with the liquidation of vested property. *Some of it, however, cannot be liquidated until lawsuits filed by persons who assert that they are not enemies are finally determined. The Trading with the Enemy Act in the present state of the law, requires that property involved in such suits must be held intact while the suits are pending.* Further, vesting is still in progress and substantial amounts will be added to the total before the vesting program is completed."

"The net proceeds remaining upon the completion of administration, liquidation and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date."

It will be seen that the key passage in the Cutler statement commencing with the words "the net proceeds" was incorporated almost verbatim into Section 39 while

at the same time Mr. Cutler made an explicit statement that the words "net proceeds after administration, liquidation and disposition" refer to the property which can only be returned by congressional action, *i. e.*, the *enemy* property remaining in the hands of the government after returns to non-enemies have been completed.

The testimony of Mr. Cutler is illuminated by certain additional facts supplied in testimony of Max Isenbergh, Chief, Appeals and Legislation Branch, Office of Alien Property, when Section 39 was being considered.[51] Mr. Isenbergh stated that some $359,000,000 would ultimately be vested and that the net vesting after administration, liquidation and returns would be "in the neighborhood of $200,000,000 net." The $200,000,000 balance remaining after returns is the fund of enemy property designated by Section 12 which can be returned, after the war, only by Congressional action. Mr. Cutler identifies it as the fund he had in mind when he said "Title to vested property is now in the United States and return cannot in any event be made without congressional action."[52]

The House Report (No. 976) accompanying H. R. 4044 stated, page 1, that:

> "The policy expressed in this section has the active support of the Department of State, the Attorney General and the Treasury. It is based on the firm resolve not to permit the recurrence of events which after the close of World War I led to the return of *enemy* property to the former owners."

And the Senate Report (No. 1742)[53] accompanying H. R. 4044 stated likewise that:

> "Section 12 of this act amends the Trading with

51. Hearings before the sub-committee of the Senate Committee on the Judiciary, 80th Congress, Second Session, on H. R. 4044; printed report pp. 14, 15.

52. See *supra*, p. 29.

53. U. S. Code Congressional Service, 1948, Vol. 2, p. 2317. The House Report is not reproduced in the Service.

> the Enemy Act so as to retain the *enemy* assets now held in the hands of the Alien Property Custodian and makes the residue of such assets available for the creation of a war claims fund as set forth below."

These reports thus emphasize that the property being retained is *enemy* property. They follow the Acheson and Cutler statements and they are in complete accord with the interpretation which the courts below gave to Section 39 (R. 60, 64).

The true significance of the legislative history is highlighted by the fact that Section 12 of the Trading with the Enemy Act provides that "after the end of the war" Congress shall direct the disposition of the enemy property seized during hostilities.

After the end of World War I a resolution terminating the war was passed by Congress on July 2, 1921 (42 Stat. 105-107), Section 5 thereof providing that:

> "All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or control of, or has been the subject of a demand by the United States of America or any of its officers, agents or employees * * * shall be retained by the United States of America and no disposition thereof made except as shall have been heretofore or specifically hereafter shall be provided by law * * *."[54]

The nearest approach to a saving clause in the 1921 Act is the reference to "disposition thereof * * * heretofore * * * provided by law" which corresponds to the language "after * * * disposition pursuant to the provisions of this Act" contained in Section 39. *Yet neither the government nor any court has ever interpreted the 1921 Act as barring Section 9(a) claims.*

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54. H. R. 873, above referred to, was modeled upon the 1921 Act.

The intimation is now made in the government's brief that the 1921 Act did bar Section 9(a) suits.[55] The government thus joins with respondent in recognizing the similarity of the 1921 Act to Section 39. However, none of the cases cited by the government support in any way the view that the 1921 Act had any relationship to Section 9(a) suits. *Klein* v. *Palmer*, 18 F. 2d 932 (C. C. A. 2d, 1927)[56] was not a Section 9(a) suit, but was a suit for damages and equitable relief arising out of alleged tortious conduct by the Custodian as an individual. It was held that the Treaty of Berlin protected agents of the government from such suits. All of the other cases cited on page 18 of the government's brief[56a] are equally irrelevant. None of them concern Section 9(a) proceedings. When the 1948 Act was passed Congress had before it the established construction that the 1921 Act did not affect Section 9(a). In addition Congress had before it the record of the Settlement of War Claims Act of 1928 under which 80% of German *enemy* property was returned and 20% retained. The decision to retain not 20%, but 100% of such enemy property would not create any new implications concerning Section 9(a).

Reference in the government's brief[57] to the protests of certain persons during the committee hearings do not assist the construction contended for by petitioner. The protests in question did not identify Section 9(a) and no conclusion can be drawn from the lack of comment or action upon such protests.[58]

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55. Brief, p. 18 and note 9.

56. Cited in the government's brief, p. 18.

56a. *United States* v. *Chemical Foundation*, 272 U. S. 1, 11; *Munich Reinsurance Co.* v. *First Reinsurance Co.*, 6 F. 2d 742, 747-9 (C. A. 2); *Junkers* v. *Chemical Foundation*, 287 Fed. 597 (S. D. N. Y.); *Lange* v. *Wingrave*, 295 Fed. 565 (E. D. La.).

57. Brief, p. 24-27.

58. Speculation is not necessary in view of the Acheson—Cutler construction as well as the construction of previous similar

The discussion as to legislative history (government brief, pp. 24-30) is surprisingly consistent with the proper purpose of Section 39, *i. e.*, that *enemy* property would be forfeited, reversing the policy of the Settlement of War Claims Act of 1928.

The fear expressed by Congressman Cox (Brief, p. 30) that many innocent persons would lose their all was at once replied to by Congressman Hinshaw who from the floor of the House stated:

> "Section 32(a) of the Trading with the Enemy Act exempts a great deal of property taken over by the Alien Property Custodian. Any property that has been wrongfully taken over from a friendly alien living in the United States, I understand may be returned to him." (94 Cong. Rec. I, page 552.)

Congressman Hinshaw's reference to a section number meant little, for the gist of his statement was contained in his second sentence from which the conclusion to be drawn is that Section 39 does not deny the rights of friendly resident aliens. A reading of the Record will show that with the encouragement of such assurances the law was considered acceptable by members who had expressed doubts as to its fairness; and nowhere in the Congressional Record or in the hearings of the subcommittee is there an explicit indication that Section 9(a) suits would be affected.

It will be recalled that Section 39 was first proposed in a manner which indicated clearly that the purpose of the government was to dispose only of the enemy property remaining after Section 9(a) returns. In view of the repeated refusal of Congress to grant express requests

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legislation (the 1921 Act) but the very existence of the latter guides would reasonably suggest the conclusion that the fears expressed by the witnesses were treated as groundless and irrelevant so far as residents of the United States are concerned.

to amend Section 9(a),[59] Section 39 appears to have become a kind of Trojan horse whose hidden purpose became disclosed only after the Act was safely past the legislative gates.

II.

No Amendment or Repeal of Section 9(a) Could Have Been Lawfully Accomplished by the Form in Which Section 39 Was Passed.

Section 9(a) is not referred to in Section 39. Since Section 39 was in the first instance proposed by the Office of Alien Property as legislation which would not affect Section 9(a) it is perfectly apparent that no compelling reason exists for saying that Section 39 must be given a construction which impliedly affects Section 9(a). Particularly is this true of a retroactive repeal by implication. The present case was pending in the United States District Court (R. 2) before the enactment of Section 39 on July 3, 1948.

Title 1 U. S. C., Sec. 109[60], provides:

> "The repeal of any statute shall not have the effect to release any penalty, forfeiture or *liability* incurred under such statute, unless the repealing Act *shall expressly so provide*, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability." (Emphasis supplied.)

The above statute has been held to be a general saving clause to be read and construed as a part of all subsequent

59. See discussion, opinion below (R. 63).

60. Act of July 30, 1947, 61 Stat. 633.

repealing statutes.[61] *Hertz* v. *Woodman*, 218 U. S. 205, 216, 217 (1910).

In Sutherland on Statutory Construction, 3rd Ed., p. 531, it is stated:

> "Where a statute is repealed, a general saving statute operates to save any substantive rights of a private nature, liability, right of action, penalty, forfeiture, or offense which has accrued under the repealed statute.
>
> "For typical provisions, see 1 U. S. C. (1934), Section 29."

1 U. S. C. 29 was identical with the present I U. S. C. 109.

The argument that Section 9(a) was repealed in whole or in part, by mere implication is refuted by *Markham* v. *Cabell*, 326 U. S. 404, 410 (1945). In that case the Custodian made a similar contention that the settlement of War Claims Act of 1928 effected a partial repeal by implication of Section 9(a) and the Court replied:

> "The right to sue, explicitly granted by Section 9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission."

Retroactive legislation is not favored by the courts and (independently of the above 1 U. S. C. 109) retroactive construction is not given to legislation unless the language employed is so clear that it admits of no other construction.[62] To say that Section 39 not only repealed or superseded Section 9(a), but did so retroactively, flouts the settled rules of statutory construction.

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61. The question whether a statutory right to sue for the return of condemned property was preserved by an identical statute was in issue and considered by the Court in *Hutton* v. *Autoridad Sobre Hogares de la Capital*, 78 F. Supp. 988 (D. C., Puerto Rico, 1948) (decided on other grounds).

62. Sutherland on Statutory Construction (3rd Ed. 1943), Vol. 2, Secs. 2201, 2212.

III.

Congress Did Not Have the Power Under the Constitution to Deprive Respondent as a Friendly Alien of Her Right to Obtain the Return of Property Erroneously Seized.

The constitutional objection is aggravated by the fact that the asserted deprivation of rights arises by mere implication. As stated in *Becker* v. *Cummings*, 296 U. S. 74, 80:

> "Only compelling language in the congressional enactment will be construed as withdrawing or curtailing the privilege of suit against the government granted in recognition of an obligation imposed by the Constitution. See *Lynch* v. *United States*, 292 U. S. 571, 586, 587; *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 489. Hence 9(a) must be broadly construed to give effect to its remedial purpose, see *Miller* v. *Robertson*, 266 U. S. 243, 248; *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 457, 471, 472."

The constitutional inhibitions are well known and have been restated many times. The right of seizure is dependent upon adequate provision made for return in case of mistake: *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 566 (1920); *Becker* v. *Cummings*, 296 U. S. 74, 79 (1935). The guarantees of the Constitution extend to friendly aliens. *Silesian-American Corporation* v. *Clark*, 332 U. S. 469, 479 (1947). The word "friendly" is as applicable to a loyal resident alien, even though of enemy nationality, as it is to one of our own citizens; *Ex Parte Kumezo Kawato*, 317 U. S. 69, 71 (1942); *Stadtmuller* v. *Miller*, 11 F. 2d 732, 738 (C. C. A. 2d, 1926); *Vowinckel* v. *First Federal Trust Co.*, 10 F. 2d 19 (C. C. A. 9th, 1926); *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950).

Congress may have the power to declare resident aliens to be enemies on the sole ground of enemy citizenship.

The point is immaterial because the power has never been exercised. No new definition of "national" has been adopted by Congress. Neither Congress nor the Executive has declared American residents to be enemies on the ground of nationality alone. No authority has ever been given to vest their property on the ground of citizenship by itself. It is apparent that our policy has continued to follow the traditional concepts set forth in Alexander Hamilton's Camillus Letter (*supra*, p. 25 n. 44).

If it were possible, therefore, to arrive at the conclusion that Section 39 did take away the right of suit granted under Section 9(a) this could only be done on a construction to the effect that Section 39 was intended to deny to *friendly* aliens their constitutional guarantees. But as so clearly appears here the construction which produces the constitutional jeopardy is the unreasonable one and the construction which preserves the constitutional guarantees is not only reasonable *but is the precise construction given by petitioner when it proposed the legislation to Congress.*

Far from supporting petitioner's extreme position, the case of *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950), cited in the government's brief (p. 38), actually demonstrates the validity of the constitutional doubts raised by the Government's construction of Section 39.

The *Eisentrager* case involved twenty-one German nationals who had been convicted of violating the laws of war while engaged in military activity against the United States. They were tried by an American military commission in the China theatre, convicted, and subsequently incarcerated in Germany. None of them had ever resided in the United States.

These non-resident German enemies filed petitions for

habeas corpus in the Federal District Court for the District of Columbia. They alleged that they had been deprived of due process of law in violation of the Fifth Amendment to the Federal Constitution because the commission which had conducted their trials was without jurisdiction to try them for their alleged war crimes. The Court of Appeals for the District of Columbia and three of the justices of the Supreme Court itself were of the opinion that the protection of the Fifth Amendment went so far as to be extended to these non-resident admitted enemies. The majority of the Court was careful to make clear that, although in its opinion the protection did not extend to this point, its holding was limited to a person who

> "(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States." (Page 777.)

Although the Court's remarks about enemies were concerned with the general law of war and not with the legislatively defined concept of enemy created under the Trading with the Enemy Act, the Court strongly stressed the point that even under the common law a great distinction existed between the non-resident enemies involved in the case and resident "enemy aliens". As to such persons, the Court cited with approval a declaration of Chancellor Kent which is very different from his comments on enemies in general quoted in the government's brief. The Court stated:

> "Our rule of generous access to the resident enemy alien was first laid down by Chancellor Kent in 1813, when, squarely faced with the plea that an alien enemy

> could not sue upon a debt contracted before the War of 1812, he reviewed the authorities to that time and broadly declared that 'A lawful residence implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity.' " (Opinion page 776.)

The Court cited with approval *Ex Parte Kumezo Kawato*, 317 U. S. 69 (1942) in which, speaking of resident aliens of enemy nationality, it was said that our laws "promise protection to all who abide by them."

The *Eisentrager* case makes it clear that there exist grave doubts that constitutional rights under the Fifth Amendment could be withdrawn from residents of the United States who are, at most, technical enemies. But that question does not even exist in the present *Nagano* case, where under the Trading with the Enemy Act the lawful resident alien is deemed by Congress to be a non-enemy, that is to say, a friendly alien, whose constitutional protection cannot be in question.

IV.

1. There Is No Merit in the Contention of Petitioner That Respondent Was "Resident Within" Japan Since Her Permanent Residence Within and Intention to Return to the United States Are Admitted and It Is Not Only Alleged in the Complaint But Established by Administrative Findings That Her Presence in Japan Was Temporary, for Family Purposes Shared With Respondent's Resident Husband.

2. There Is No Merit in the Claim That Any Question of Construction Exists Respecting the Words "Resident Within" as Used in the Statute Since the Law Applicable to the Particular Facts of the Present Case Has Been Established by Repeated, Uniform Decisions Over a Thirty-Four Year Period.

1. The facts alleged or competent under the complaint include: (a) respondent's admitted residence in the United States (R. 2, 3, 51); (b) her admitted lack of any intention to surrender that residence (R. 3, 51); (c) the circumstances of compulsion characterizing her absence in Japan; (d) the family character of the purpose shared with the husband; (e) the undeniable reality that respondent was a wife whose intention to rejoin her resident husband cannot be doubted; (f) the admitted temporary character of the absence; and (g) the concurrence of the State Department and the Justice Department, after independent investigations and hearings, in the finding that Mrs. Nagano was a permanent resident of the United States whose absence was temporary only.

Surely these considerations bar any conclusion at this time that respondent was "resident within" Japan. Having been correct on the facts the decision below presents no questions of law meriting review in this Court.

The government itself admits in its brief that the mere presence of respondent in Japan would not make her a "resident within" an enemy country if (1) her presence was the result of compulsion; or (2) her presence was temporary.[63] Both of these conditions are met in the present case.

Mr. and Mrs. Nagano's daughters were compelled by our immigration laws to make their permanent homes in Japan.

63. Government brief, pp. 41, 47.

The daughters could not plan a life in this country because, being of Japanese birth, they could not be here more than temporarily under any circumstances. The election to arrange marriages in Japan was compulsory because our immigration laws made it so.

The presence of the daughters in Japan being thus made compulsory by law, the temporary presence of the mother was the necessary consequence of a statutory compulsion. The mother's presence in Japan was not on any individual errand of her own. She was with her daughters as the representative of the two parents, carrying out a family obligation. Her presence was no more a matter of free choice than is the "decision" of any parents to provide food, shelter and education to their children. It is not for the government to say whether Japanese custom was right in demanding the presence of the parent to arrange the marriages of the daughters (R. 6). The daughters were compelled by our own law to remain in Japan and their needs are to be measured by the demands of that country.

Since the government has not sought review of the record in the companion case of *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753 (C. A. 7th, 1951), this court does not have before it the record in that case of the evidence which would also be competent in the present case. Inferences favorable to respondent are admitted and it is possible to conceive, within limits, of the evidence existing behind the allegations. However, the sparse framework of an allegation and the cold logic of a rule of law are poor substitutes for the warm force of the living facts. Does a theoretical admission that Mrs. Nagano was anxious to return to this country conjure up the realization of the character of respondent's duties which is presented by her letter to her husband stating:

"Masako has already reached the age of 26. Un-

less I can arrange her marriage this spring I shall have no desire to live longer. It is not good for her to live alone and have her marriage delayed too long. It will change her character. In fact, lately I can no longer control her. I feel that it would be better if I were dead. On many days she is gloomy and moody. I can hardly endure watching her so depressed. I have not told you this before, but have kept my sorrow to myself. I have neither selfish ambition nor personal desire, but only her happiness in mind. Every day, I feel as if I were sitting on a prickly matting studded with needles * * *"

Is a legal presumption as meaningful as a letter stating:

"Now it looks as if both our daughters are going to be married at the same time. * * * When our two daughters are married, my duty will be all over and a great burden will be off my shoulders. * * * I shall be so anxious to join you immediately and I would like to live a very simple life over there to make up for what I have lost in the past. * * *"

The question whether the period of 1933 to 1941[64] represents a temporary absence is a fact question dependent not on the length of the period but on all the circumstances of the absence. The very reasons for the absence were of a self-limiting character. Both Mrs. Nagano and her husband expected the marriages to be arranged within a relatively short period. Masako attained a marriageable age (18 years) in 1932; her sister Takako reached that age in 1937. Mrs. Nagano's correspondence reported progress and on occasions in 1939, 1940 and 1941 reported that marriages were imminent. Other letters recorded bitter disappointment. In the plans of Mrs. Nagano and her husband her absence in Japan was not only transitory but in effect she was packed and ready to leave by the next ship.

64. See Statement, *supra*, p. 7.

Also it must be remembered that the evidence includes not only the immediate purpose of the absence but the whole background of circumstances establishing the permanent American residence of both husband and wife. Mention has been made (see statement, *supra*, p. 5) of the husband's identification with the activities of the community; his permanent investments in Chicago; even his testamentary plan. These circumstances, too, bear upon the temporary and compulsory character of Mrs. Nagano's absence. It is neither realistic, nor just, nor consistent with the facts and inferences admitted by a motion to dismiss, for the petitioner to urge that Mrs. Nagano was resident within Japan. Respondent was plainly not resident within Japan within the ordinary legal meaning of the word residence.

2. The foregoing facts present no borderline question requiring construction of the term "resident within". None of the cases which have involved questions of residence within the enemy country present any question as to the proper application of the law to the facts of the present case. The cases decided since the passage of the Act in 1917 (a period of thirty-four years to date), include *McGrath* v. *Zander*, 177 F. 2d 649 (1949); *Sarthou* v. *Clark*, 78 F. Supp. 139 (D. C. Cal. 1949); *Stadtmuller* v. *Miller*, 11 F. 2d 732 (C. C. A. 2d, 1926); *Vowinckel* v. *First Federal Trust Co.*, 10 F. 2d 19 (C. C. A. 9th 1926); and *Miller* v. *Sinjen*, 289 Fed. 388 (C. C. A. 8th, 1923). All of these cases support the reasonable principle that presence in a country for purposes of a merely temporary character falls short of establishing residence. There exists no conflict of decision among any of these cases.

In the *Zander* case the plaintiff, an American woman, while present in Germany during the war married a soldier

in the German army. Although the marriage bestowed German citizenship on plaintiff, the court held:[65]

> "* * * Conceded facts leave only the legal question whether she was '*resident within*' Germany. Citizenship is not directly involved."

On the basis of the particular facts of the case the court held that Mrs. Zander was not resident within Germany notwithstanding her physical presence there and her marriage.

It is respectfully submitted that this court does not take jurisdiction for the purpose of considering the interminable distinctions and similarities which can be drawn between the particular facts of cases such as the *Zander* case and the particular facts of this present *Nagano* case.[66] That office was performed by the Court of Appeals and no important reason exists for reviewing its decision. However, the following observations concerning the *Zander* case are illustrative:

> (a) As in all the cases cited, the court recognized that mere temporary presence is not "residence within".
>
> (b) Plaintiff did not become "resident within" Germany even though she went there voluntarily; nor did the added fact make any difference, that while Germany was at war she voluntarily married a German national, so long as it appeared that she had a genuine intention to return home with her husband when the war bars were removed.
>
> (c) Recognition was given not merely to the activities of the wife as an individual, but to the activities of the husband, which supported the conclusion that the intent to return to this country was genuine. Com-

65. 177 F. 2d 652.

66. As the petitioner is at pains to point out the facts in each case differ from the *Nagano* case. That is to be expected. The facts in each case also differ greatly from the facts in each other case.

ment has been made elsewhere in this brief on Mr. Nagano's status in the community.[67]

(d) Recognition was given to the steadfastness of purpose of Zander and his wife which carried them through the war and brought them out of it reunited as they had planned from the beginning. As the court said,[68] "the good faith of this undertaking is proven by the persistency with which both pursued it to a final consummation." The same quality of steadfastness and persistency is abundantly present in this *Nagano* case. A mission involving a difficult separation was commenced and carried out to the end that the daughters might have the enduring marriages which our oriental exclusion laws made not possible in this country. In the end the Naganos were reunited as they too had planned from the beginning.

(e) In the *Zander* case the court considered the presumption that the plaintiff's residence was with her husband in Germany. Presumably this point was urged by the government. The court recognized that the rule existed but held that it must yield to the facts. In the present *Nagano* case, the presumption becomes of vital importance because it runs with the facts and not against them. It accords with the findings of the State Department and the Justice Department, Immigration and Naturalization Service; it accords with the allegations of the complaint; and it accords with respondent's actions.

In *Sarthou* v. *Clark*, 78 F. Supp. 139 (D. C. Cal. 1949) the words "resident within" as used in the Act were re-examined in the light of the World War II amendments.[69] Notwithstanding the claimant's physical presence in Germany where he owned a villa other facts showed clearly

67. See statement, *supra*, p. 5.

68. 177 F. 2d 653.

69. Petitioner makes the statement (brief, 47) that the "asserted enemy in *Sarthou* could be deemed a transient sojourner." Von Neindorff's annual stays in Germany went back a great many years. His purchase of a villa was not the act of a "transient" in the sense used by the government, *i. e.*, one merely "passing through."

that he regarded Tulare County, California as his home. The court accordingly followed the uniform rule that mere presence is not residence when a consideration of all of the facts, including the element of intention, shows that the presence was merely temporary.

The same considerations dominate the cases of *Vowinckel* v. *First Federal Trust Co.*, 10 F. 2d 19 (C. C. A. 9th, 1926); *Stadtmuller* v. *Miller*, 11 F. 2d 732 (C. C. A. 2d, 1926) and *Miller* v. *Sinjen*, 289 Fed. 388 (C. C. A. 8th, 1923). Each case involved:—(1) A suit under Section 9(a); (2) presence within the enemy country; and (3) a finding, upon all the facts, that the presence was temporary and did not amount to "residence within". In the *Vowinckel* case the plaintiff was a German alien doctor who was a permanent resident of the United States. In 1915, long before this country entered the war, he entered the service of the German Red Cross—a temporary but laudable purpose. Mrs. Nagano's purpose was temporary and the court below found it to be praiseworthy. The duty of a parent to a child is not wholly a private and personal matter. Society places such obligations in a special class. Up to a certain point they are made compulsory; beyond that they continue to merit special recognition. In the *Stadtmuller* case the plaintiff, a German citizen, was visiting Germany at the outbreak of war and was detained there until the war was ended. The element of constraint, during the war, was held to negative any "residence within" Germany.[70] The *Sinjen* case involves the issue in a Section 9 (a) suit whether plaintiff could prove that during his stay in Germany he had the intention of retaining his American citizenship, of returning to the United States and remain-

70. Certainly any realistic appraisal of the circumstances will include the recognition that during the war Mrs. Nagano had no possible chance of obtaining permission to leave Japan or to enter the United States.

ing there permanently.[71] The detailed facts in the *Sinjen* case, laid parallel with the facts in the *Nagano* case, are strongly persuasive that the *Nagano* case is a meritorious one for application of the general rule that mere temporary presence is not residence. Material elements in the *Sinjen* case included the leaving of Nebraska property in the care of a brother-in-law; the investment of income in the United States; non-participation in German affairs and so on. Without extending the discussion of facts, each such element has its far more persuasive counterpart in the *Nagano* case.

The government discounts the *Sinjen* case, stating (Brief p. 49, n. 24): "it dealt with the concept of residence necessary to work an expatriation under the nationality laws; it in no way involved the concept of residence under Section 2(a) of the Trading with the Enemy Act." However, in that case the court expressly declared that the issue was whether plaintiff could prove he had the *intention* of returning to the United States. Intention is one of the important elements of residence in the usual sense of the word. While thus discounting the *Sinjen* case the government cites *Savorgnan* v. *United States*, 338 U. S. 491, to establish that intention is not an element of residence. There are these differences, however: (1) the *Savorgnan* case is not a suit under the Trading with the Enemy Act but was a suit brought under the Nationality Act of 1940 to obtain a judgment declaring the United States citizenship of the plaintiff in that case; (2) the facts are completely irrelevant: petitioner in that case was a native born United States citizen who had applied for and received naturalization as an Italian citizen and thereafter had gone to Italy to live; and (3) on the issue of residence, the Court was following certain specific language in Sections

71. It is clear that Sinjen was no "transient sojourner." His stay in Germany was extended.

403(a) and 104 of the Nationality Act of 1940 as this had been construed under the report of the Secretary of State, Secretary of Labor and the Attorney General to the Congress on the proposed bill which thereafter became the Act in question. The quoted language from the opinion (Appellant's brief, p. 51) is not on the general construction of the word "residence" at all, but merely a restatement by the Court of the construction given this particular Act by the above report to Congress—a construction which modified, for nationality purposes, the concept of residence existing under previous Acts.

In its brief the government makes the incorrect statement that the court below "equated" residence to domicile. We are sure the court was not unfamiliar with the well known distinctions between residence and domicile. Indeed the distinction is expressly recognized in the two most recent cases of *Sarthou* v. *Clark*, 78 F. Supp. 139 (D. C. Cal., 1949) and *McGrath* v. *Zander*, 177 F. 2d 649 (1949), wherein the respective courts involved specifically stated that residence has certain domiciliary qualities. The concern of the court below, however, was not with domicile but with application of particular facts to the question of residence in the light of a uniform series of decisions rendered over a period of thirty-four years. Not one of these cases involved the slightest question of construction of the word residence; the question in each case has been primarily one of fact as must necessarily be true whenever a statute employs a broad term such as "residence."

As stated in Kennan on Residence and Domicile (1934)[72] p. 28:

> "All the authorities agree that each case must be decided in its own particular circumstances and that general definitions are calculated to perplex and mis-

72. Cited by petitioner: brief, p. 42.

> lead. It is apparent that the word residence, like domicile, is often used to express different meanings according to the subject matter. * * * The word 'residence' is an elastic term of which no exact definition, which is applicable in all cases can be given at law, but it must be construed in every case in accordance with the object and interest of the statute in which it occurs. * * *"

Clearly no arbitrary application of the word residence can be permitted to jeopardize the broad purpose of the Trading With the Enemy Act. The policy of the Act is to provide wide latitude to make seizures upon suspicion, but for this very reason it is all the more necessary to assure that returns are to be made in case of mistake.[73] *Intention* is a primary element of residence, and while the evidence in this regard has not been heard in the present case, enough was heard by the Justice Department, Immigration Service, to lead it to the conclusion that there was *ample* evidence to support the determination made by the Board of Special Inquiry and the American Consular Service that respondent was returning from a temporary visit abroad. There are facts in the present case which are peculiarly significant on the question of residence. Respondent was not in Japan as an unattached person. She was there as an extension of a family unit which was resident in the United States. Her means of support derived not from activities in Japan but from her husband in the United States. Residence is commonly said to be established for business, health or pleasure. But respondent's purpose in Japan was none of these. It was the performance of a parental duty common to both members of the family unit. The actual physical residence of the supporting member of the family—the husband—continued in the United States, without any intention that the husband and wife were ever to be

73. *Supra*, p. 16; constitutional guarantee of return in case of mistake, *supra*, p. 37.

separated persons. The court below has rightly decided that upon consideration of all the facts it cannot be concluded that respondent was "resident within" Japan.

The government did not contend in the Court of Appeals nor in its petition for a writ of certiorari that respondent's mere physical presence in the enemy country at the outbreak of war is by itself a complete bar to recovery under Section 9(a). That contention, belatedly added to the government's brief,[74] is without merit because no such drastic nullification of Section 9(a) was ever contemplated by any World War II legislation or Executive Orders.

Petitioner's argument is based on the provisions in Section 32(a) and Executive Order 9095, as amended.

Section 32(a) authorizes certain discretionary administrative returns limited to instances which are found to be "in the interest of the United States." The discretion is absolute; no judicial review is authorized.[75] The section is not a substitute for Section 9(a). Primarily it is concerned with persons who were technical enemies, such as Frenchmen and Belgians residing in territory occupied by the enemy.[76] Under Section 32(a) discretionary administrative relief is barred to persons of enemy nationality present in the enemy territory (except persecutees). When Section 32(a) was passed Section 9(a) was not amended. No basis whatever exists for the assertion that the limitations and guides for the exercise of discretion under Section 32(a) must be carried over into Section 9(a). In *McGrath* v. *Zander,* 177 F. 2d 649, 652 (1949), the court specifically stated:

"Although with certain exceptions citizenship and

74. It is also noted that no such contention is apparent in the Questions Presented or the Specification of Errors in the government's brief.

75. So stated in the government's brief, p. 12.

76. So stated in the government's brief, p. 12.

presence within the territory of an enemy country ban relief under the discretionary authority granted by Section 32(a) they of themselves do not bar recovery under Section 9(a)."

Nor can any inference be drawn that the residence test of enemy character for the purpose of returns under Section 9(a)[77] has been nullified by the provisions of Executive Order 9095 relating to the *vesting* of property belonging to persons "within" the enemy country, since while mere presence by itself may justify vesting as an initial step, yet it is no test of enemy character and it has never been held to be a bar to the return of property under Section 9(a).

Vesting takes place on suspicion, the action being taken on appearances and without investigation.[78]

As a practical matter mere presence in the enemy territory is sufficient to justify an assumption, for *vesting* purposes, that residence exists. In time of war there is scant opportunity for inquiry into the situations of persons known to be in the enemy country. In all of the Section 9(a) cases cited and discussed in this brief the individuals involved were in but not resident in the enemy country, and the vesting, as an initial step, was justified.[79]

77. See Section 9(a), *infra*, App. p. i authorizing returns to persons "not enemies"; and Section 2, *infra*, App. p. i defining enemies as persons "resident within" the enemy territory.

78. *Supra*, p. 16 and n. 15; *Clark* v. *Uebersee Finanz-Korporation*, 158 F. 2d 313, 315. Cf. *Lamar* v. *Brown*, 92 U. S. 187, 196 (1875) stating: "The military forces act in the field according to the laws of war and seize that which is apparently the subject of capture. They act upon appearance, not upon testimony. * * * Their duty is to seize and hold, leaving it to the owners to make good their claim, as against the capture, in the appropriate tribunal established for that purpose."

79. As far back as the Civil War it was held that persons residing in the confederate states must be considered as enemies *while they remained* in those states, "but this has never been held in respect to persons faithful to the Union, who have escaped from those states and subsequently resided in the loyal states or in neutral countries": *The Peterhoff*, 5 Wall. 28, 60 (1866).

Moreover, the actual physical control which the enemy country can exercise over persons within its borders makes vesting justifiable or necessary as an initial step. The government itself says (brief, p. 43):

> "The definition of 'enemy' in Section 2 is framed on the hypothesis that the *presence* of the owner behind the enemy's lines puts his American property within the power of the enemy government. Accordingly the owner, regardless of citizenship or personal sympathies, is classed as an 'enemy.'" (Emphasis supplied.)

Therefore, the provisions of Executive Order 9095, as amended, with reference to persons "within" the enemy country, mark no change of policy as regards the vesting of property and do not support petitioner's contention that in World War II "presence" in the enemy country has become a bar to returns under Section 9(a).

In contrast to the standards upon which vesting takes place, returns of property are made only after investigation. The inquiry then becomes whether the individual involved was or was not an enemy. In World War II the concept of enemy was broadened, as authorized under amended Section 5(b) to include persons "acting for (including cloaks for) the enemy." As explained in *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 485, Germany in particular had developed techniques for concealing enemy ownership, particularly through the corporate guise, and Section 5(b) of the Act was amended to cope with the problem of enemy interests which masqueraded under innocent fronts. The Court declared (page 487) that Sections 2, 5(b) and 9(a) should be given the most harmonious reading possible so that one section would not defeat the purpose of any other. Thus a person acting for the enemy, or an apparently friendly corporation owned or controlled by the enemy, would be considered an enemy for the pur-

pose of returns under Section 9(a). *The court however expressly negatived the argument that once the seizure is shown to be permissible under Section 5(b) there is no remedy under Section 9(a).* Yet such is the argument here presented by the government—that the mere presence in the enemy country, which authorizes vesting, by itself bars returns.

The obvious answer is that no significance attaches, as regards returns under Section 9(a), to the executive policy set forth in Order 9095 that vesting is justified on the ground of presence alone. If the executive intention had been otherwise it is to be doubted that the legislatively prescribed test of residence could arbitrarily be changed by fiat. No such authority was conferred under broadened Section 5(b).

The *Uebersee* decision has been followed in the above *Guessefeldt, Sarthou* and *Zander* cases (as well as in the present *Nagano* case), all holding that (absent other factors) mere presence within the enemy territory is not a bar to the return of property in Section 9(a) proceedings when it is established that the claimant was not resident within the enemy territory.

Conclusion.

For the reasons stated it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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JOHN ALDEN POWERS,
Counsel for Respondent.

November, 1951.

APPENDIX.

Excerpts from the Trading with the Enemy Act of 1917, as amended (U. S. C. Title 50 Appendix):

§ 2. Definitions. The word "enemy" as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

> (a) Any individual * * of any nationality, resident within the territory * * of any nation with which the United States is at war * *.

§ 5(b) (as amended on December 18, 1941 by Title III of the First War Powers Act (U. S. C. Title 50, pocket part, Appendix Sec. 5(b)). During the time of war * * any property or interest of any foreign country or national thereof shall vest when, as and upon the terms directed by the President * *.

§ 9(a). Any person not an enemy * * claiming any interest, right or title in any money or other property which may have been seized by him (the Custodian) hereunder * * may file with the said custodian a notice of his claim * *. * * if the claimant shall have filed the notice as above required, said claimant may institute a suit in equity * * in the district court of the United States for the district in which such claimant resides * * to established the interest, right, title or debt so claimed, and if so established, the court shall order the * * delivery to said claimant of the money or other property so held by the Alien Property Custodian.

§ 12. * * After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct * *.

§ 32(a). The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

(2) that such owner, and legal representative or successor in interest, if any, are not—

* * * * *

(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section (March 8, 1946) was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory, Provided That notwithstanding the provisions of this subparagraph (D) return may be made to an individual who, as a consequence of any law, decree or regulation of the

nation of which he was then a citizen or subject, discriminating against political, racial or religious groups, has at no time between December 7, 1941 and the time when such law, decree or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation; * *

§ 39. (Section 12 of the War Claims Act of 1948, 62 Stat. 1246, enacted July 3, 1948.) No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agent of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of Section 32 of this Act or of the Philippine Property Act of 1946.

Excerpts from Executive Order 8389 (April 10, 1940, 5 F. R. 1400 as amended by Ex. Ord. No. 8785, June 14, 1941, 6 F. R. 2897; Ex. Ord. No. 8832, July 26, 1941, 6 F. R. 3715; Ex. Ord. No. 8963, Dec. 9, 1941, 6 F. R. 6348; Ex. Ord. No. 8998, Dec. 26, 1941, 6 F. R. 6787):

5. * * E. The term "national" shall include,

(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order, * *

(ii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, and

(iv) Any other person who there is reasonable cause to believe is a "national" as herein defined * *.

Excerpts from Executive Order 9095 (March 11, 1942, 7 F. R. 1971, as amended Ex. Ord. No. 9193, July 6, 1942, 7 F. R. 5205; Ex. Ord. No. 9567, June 8, 1945, 10 F. R. 6917):

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

(a) Any business enterprise within the United States which is a national of a designated enemy country * * and any interest of any nature whatsoever in such business enterprise held by an enemy country or national thereof;

(b) Any other business enterprise within the United States which is a national of a foreign country * * and any interest of any nature whatsoever in such business enterprise held by a foreign country or national thereof, when it is determined by the Custodian and he has certified to the Secretary of the Treasury that it is necessary in the national interest, with respect to such business enterprise, either (i) to provide for the protection of the property, (ii) to change personnel or supervise the employment policies, (iii) to liquidate, reorganize or sell, (iv) to direct the management in respect to operations, or (v) to vest.

10. For the purpose of this Executive Order:

(a) * * The term "national" shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended, *provided, however*, that persons not within designated enemy countries * * shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy occupied country or area; or (iii) that

the national interest of the United States requires that such person be treated as a national of a designated enemy country.

General Saving Statute, 61 Stat. 633, 1 U. S. C. Sec. 109. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall expressly so provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

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No. 169

In the Supreme Court of the United States

OCTOBER TERM, 1951

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

KAKU NAGANO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In this Reply Brief we shall deal only with two aspects of Respondent's Brief which, we think, most clearly reflect misunderstanding of the Trading With the Enemy Act and the executive orders issued thereunder.

First, respondent concedes that a "national of a designated enemy country" may not recover under Section 9 (a) (Brief, pp. 11, 16–17, 34). And if the language of Executive Order 9193 has any meaning, it is clear that respondent is a "national" in that sense. She was "within"

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Japan and she is a citizen of Japan. Respondent assumes that "within" in Executive Order 9193 is identical in meaning with "resident within" in Section 2 (Brief, p. 17). We find no warrant for thus writing a word into the Executive Order. The applicable definition of "national" in Executive Order 8389, which the definition of Executive Order 9193 modifies, uses both "domiciled" and "resident"; a "national" is defined as "Any person who has been domiciled in, or a subject, citizen or resident of a foreign country." Unless the word "within"—which appears three times in Executive Order 9193—was used in the sense of physical location, as distinguished from the ties sometimes denoted by "domiciled" or "resident," it is difficult to see why it was used at all.

If respondent is a "national of a designated enemy country" the result in this case will be the same whether it is held that recovery by such a "national" is barred by Section 39 or that as such a national she is an "enemy" within the broadened definition of that term. See, *Clark* v. *Uebersee Finanz-Korp., A. G.,* 332 U. S. 480, 486–488, and Petitioner's Brief, pp. 53–54.

On the admitted facts the Custodian made no mistake in finding that "Kaku Nagano, whose last known address is Tokyo, Japan," is a national of a designated enemy country (Japan)

(R. 10). Respondent was—and is—a citizen of Japan and she was within Japan (R. 2–3, 6–7). To apply Section 39 to her property is not to hold, as respondent repeatedly urges (pp. 10, 11), that the function of that Section is "To retain * * * all property whether taken by mistake or not" (Brief p. 20; see also pp. 10, 11). There was no mistake in this case.

Second, respondent's construction of Section 39 is untenable. She asserts that the subject of the section is the net proceeds remaining after completion of administration, etc., of German and Japanese property, and that the section thus prohibits only the return of the proceeds remaining after completion of proceedings otherwise authorized under Section 9 (a) and other provisions of the Act (Brief, pp. 10, 18–23). To support this argument, she is forced to resort to an astonishing inversion of the statutory language (Brief 18). Section 39 contains three sentences (Petitioner's Brief, Appendix p. 64). It is the first sentence which specifies what property shall not be returned. That sentence provides that "No property * * * of Germany, Japan, or any national thereof * * * shall be returned." The second sentence deals with a wholly different matter—the administrative duty of the Custodian to cover certain funds into the Treasury. It provides that the net proceeds "of any *such* prop-

erty or interest"—i. e., the property whose return is prohibited by the first sentence—shall be covered into the Treasury. [Emphasis added.] Thus, the prohibition against return applies to all "property" of German and Japanese nationals; it cannot be read as applying only to the "proceeds" of such property. And, as more fully developed in our main brief (pp. 25–30), in thus prohibiting the return of German and Japanese vested property, Congress was fully aware that the effect of the section would be to extend the statutory definition of "enemy" in Section 2 to include German and Japanese nationals even though not resident in enemy territory.

In seeking further support of her position that the fund to be used for the payment of war claims was to consist merely of such property as was not returnable under Section 9 (a) of the Act as it existed prior to the addition of Section 39, respondent refers to statements of government witnesses before the House Committee that German and Japanese vested property should be covered into the Treasury after administration and disposition of such property was completed in accordance with existing law. (Respondent's Brief, pp. 27–29.) Respondent concludes that since under the law, as it then existed, returns under Section 9 (a) were per-

mitted to a national of Japan not resident there, the net proceeds referred to by government witnesses meant the proceeds remaining after such returns. Respondent's conclusion is based on an erroneous assumption. In March, 1947, when the government witnesses testified, it was the government's position that a national of any foreign country was not eligible to sue under Section 9 (a) for the recovery of vested property. See *Clark* v. *Uebersee Finanz-Korp. A. G.*, 332 U. S. 480, 486–487 (decided December 8, 1947).[1]

In any event, these general statements, and others to which respondent refers, were not addressed to the problem with which this case deals. As we have pointed out in our main brief (pp. 26–28), when attention was explicitly focused on that problem at the Senate hearings, the Senate subcommittee clearly understood that the effect of the bill would be to bar returns

[1] See also, the testimony of Mr. Cutler and of Mr. Isenbergh, both of the Office of Alien Property, *Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 79th Congress, 2d Session, on S. 2378 and S. 2039;* also the testimony of Mr. Markham, then Alien Property Custodian, reported in *Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 79th Congress, 2d Session, on H. R. 5089, p. 6.*

(except under Section 32) to German and Japanese nationals wherever resident and refused to adopt proposed amendments to change that result.[2]

Respectfully submitted.

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NOVEMBER 1951.

[2] Respondent again misunderstands the Government's position when she states that petitioner argues that Public Resolution No. 8 of 1921 barred suits by German nationals under Section 9 (a) (Brief, pp. 32–33). What petitioner contends is that the Treaty of Berlin barred suits by German nationals "wherever resident" (Petitioner's Brief, pp. 17–18). The cases cited on page 18 of petitioner's brief rely on the Treaty, not on the Resolution.

U. S. GOVERNMENT PRINTING OFFICE : 1951

No. 169 6b

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No. 10005

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SHINSAKU NAGANO, PLAINTIFF-APPELLANT

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, DEFENDANT-APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Honorable WILLIAM J. CAMPBELL, District Judge

DEFENDANT-APPELLEE'S PETITION FOR REHEARING

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FILED
MAR 12 1951
KENNETH J. CARRICK
CLERK

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Honorable WILLIAM J. CAMPBELL, District Judge

DEFENDANT-APPELLEE'S PETITION FOR REHEARING

On February 26, 1951, this Court reversed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, and remanded the cause with directions to enter judgment for plaintiff for recovery of 3,105 shares of stock of the Fuji Trading Company.

In accordance with Rule 22 of this Court, defendant-appellee files this Petition for Rehearing on the following grounds:

1. *There is an issue which has not been disposed of.*

At the trial in the District Court the defendant in-

troduced evidence in support of alternative contentions with respect to said 3,105 shares tending to show:

(a) That plaintiff had made a gift to his wife of the shares;

(b) That plaintiff's wife was legally entitled, on the basis of consideration paid by her, to the shares.

The District Court held that plaintiff was not entitled to recover because in 1932 he made a gift of said shares to his wife (R. 141–142). Accordingly, it found it unnecessary to decide defendant's alternative contention that plaintiff's wife was in any event entitled to substantially all the shares by right of purchase (R. 145). It made no findings with respect to the issue raised by that contention.

This Court held that there was not a sufficient delivery of the shares by the plaintiff to his wife to constitute an effective gift, reversed the judgment of the trial court and remanded the cause with directions to enter judgment for the plaintiff. In so doing this Court failed to pass upon the issue raised by defendant's alternative contention, "(b)", *supra*, although that contention was argued by defendant in his Brief in this Court. Defendant's Brief, pp. 29–32. As we have indicated, the District Court did not make findings on that issue, which depended in substantial part on the credibility of plaintiff's testimony. Since the plaintiff may not recover in this action property which belonged to his wife as of the date of vesting it is submitted that the direction to enter judgment for the plaintiff without disposing of the issue raised by defendant's alternative contention was erroneous.

2. *Section 39 of the Trading With the Enemy Act prohibits recovery by the plaintiff.*

This action was tried in the District Court before the enactment in 1948 of Section 39. Plaintiff's counsel stated, however, at the argument before this Court, that if the position of the defendant in the companion case of *Kaku Nagano* v. *McGrath*, No. 10192, with respect to the application of Section 39, were upheld, it would apply equally in this action. This statement accords with the holdings in District Courts in other Circuits. *Schill* v. *McGrath*, 89 F. Supp. 339 (S. D. N. Y.), and *Gussefeldt* v. *McGrath*, 89 F. Supp. 344 (D. C. D. C.), and the unreported cases cited in defendant's brief in No. 10192. The opinion of this Court in this action, however, did not pass upon the application of Section 39.

Plaintiff is a citizen of Japan and as such, a "national" of Japan within the Act. Executive Order 8389, as amended, Section 5E (i) (5 F. R. 1400). The definition of "national" in the Executive Order was twice ratified by the Congress. Joint Resolution of May 7, 1940, 54 Stat. 179; Section 302, First War Powers Act, 55 Stat. 840. According to the authorities referred to *supra* citizenship of Germany or Japan is in itself sufficient to bar a recovery under Section 9 (a) of the Trading With the Enemy Act.

Wherefore, defendant respectfully prays:

(1) That a rehearing be granted, or,

(2) That the opinion and mandate of this Court be amended to direct a new trial or that the District Court make appropriate findings with respect to de-

fendant's alternative contention that plaintiff's wife was entitled to the shares in question by virtue of having paid for them, or,

(3) For such other and further relief as to the Court may seem meet and proper.

Respectfully submitted.

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U. S. GOVERNMENT PRINTING OFFICE: 1951

JANUARY 28, 1952.

Per Curiam Decisions.

No. 169. MCGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* NAGANO. Certiorari, 342 U. S. 809, to the United States Court of Appeals for the Seventh Circuit. Argued November 29, 1951. Decided January 28, 1952. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *James D. Hill* argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Baynton, George B. Searls* and *Irwin A. Seibel. Edward R. Johnston* argued the cause and filed a brief for respondent. Reported below: 187 F. 2d 759.